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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6584

In the Matter of

SHERYL ANN TRAPP, DEE ANN TRAPP,
and DUANE EDWIN TRAPP, Minors,

ROBERT EMERY TRAPP, Father,
LINDA MAE TRAPP, Mother and
Appellant.

ON APPEAL FROM THE SUPREME COUFT OF MISSOURI

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 4

QUESTIONS PRESENTED 4

STATEMENT OF THE CASE 6

THE QUESTIONS ARE SUBSTANTIAL. 20

I.A. THE MISSOURI NEGLECT STATUTES ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD 20

I.B. THE MISSOURI NEGLECT STATUTES DO NOT REQUIRE A THESHHOLD OF HARM AND ARE NOT NARROWLY DRAWN 30

II. THE NEGLECT PETITION WHOLLY FAILED TO SATISFY THE NOTICE OF ISSUES REQUIREMENT OF DUE PROCESS. 34

III. THE CUSTODY ORDER WAS TOTALLY WITHOUT EVIDENTIARY SUPPORT IN VIOLATION OF DUE PROCESS 37

IV. DUE PROCESS REQUIRES AT LEAST THE CLEAR AND CONVINCING EVIDENCE STANDARD OF PROOF IN NEGLECT PROCEEDINGS 40

V. DUE PROCESS REQUIRES A STATEMENT OF REASONS FOR A FINDING OF NEGLECT IN ORDER TO PERMIT MEANINGFUL REVIEW 41

VI. THE CHILD SUPPORT ORDER IS INVALID FOR THE REASONS SET FORTH UNDER QUESTIONS I(A) AND I(B). 42

VII. THE CHILD SUPPORT ORDER IS INVALID BECAUSE ENTERED WITHOUT NOTICE AND OPPORTUNITY TO BE HEARD 43

CONCLUSION 44

APPENDIX (Opinion of Supreme Court of Missouri) . . . . . App. A
APPENDIX (Judgment of Supreme Court of Missouri) . . . . . App. B
APPENDIX (Order on Motion for Rehearing) . . . . . App. C
APPENDIX (Notice of Appeal). . . . . App. D
APPENDIX (Statutory Provisions Involved) . . . . . App. E

TABLE OF AUTHORITIES

Addington v. Texas, 441 U.S. 418 41

Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10 (S.D.Ia.), aff'd. 545 F.2d 1137 (8th Cir.) 22, 28, 30, 32, 34, 40

Aptheker v. Secretary of State, 378 U.S. 500 34

Armstrong v. Manzo, 380 U.S. 545 35

Breed v. Jones, 421 U.S. 519 24

Carey v. Population Services International, 431 U.S. 678 22

Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182 4

City of Raytown v. Roach, 360 S.W.2d 741 (Mo.App.) 36

Cleveland Board of Education v. LaFleur, 414 U.S. 632. 21

Cobb v. Wyrick, 379 F.Supp. 1287 (W.D.Mo.) 38

Connally v. General Construction Co., 269 U.S. 385 25

Cunha v. Brewer, 511 F.2d 894 (8th Cir). 38

Danforth v. State Dept. of Health and Welfare, 303 A.2d 794 (Me.Sup.) 24

Davis v. Paige, 442 F.Supp. 258 (S.D.Fla.) 22, 24

Davis v. Smith, 583 S.W.2d 37 (Ark.Sup.) 27

Duchesne v. Sugarman, 566 F.2d 817 (2d Cir.) 23

Dupree v. Wyrick, 415 F.Supp. 168 (E.D.Mo.). 38

Garner v. Louisiana, 368 U.S. 157. 38

In re Gault, 387 U.S. 1. . . . . 24, 35, 36

Giaccio v. Pennsylvania, 383 U.S. 399. 25

Grayned v. City of Rockford, 408 U.S. 104. 26

Kent v. United States, 383 U.S. 541. 42

In re Luscier, 84 Wash.2d 135, 524 P.2d 906. 24

Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123 4

May v. Anderson, 345 U.S. 528. 21

Meyer v. Nebraska, 262 U.S. 390. 21

Minor Children of F.B. v. Caruthers, 323 S.W.2d 397 (Mo.App.) 24, 37

Mullane v. Central Hanover B. & Tr. Co., 339 U.S. 306. 35

In re Myricks, 85 Wash.2d 252, 533 P.2d 841. 24

In re Neglected Child, 130 Vt. 525, 296 A.2d 250 37

Pierce v. Society of Sisters, 268 U.S. 510 21

Prince v. Massachusettes, 321 U.S. 158 21

R. v. Superior Court, 19 Cal.App.3rd 895, 97 Cal.Rptr. 158 23

Raley v. Ohio, 360 U.S. 423. 4

Reynolds v. Stockton, 140 U.S. 254 44

Roe v. Conn, 417 F.Supp. 769 (M.D.Ala.) 22, 23, 27, 28, 30, 31, 32, 34

Roe v. Wade, 410 U.S. 113. . . . . 21, 31

Rose v. Locke, 423 U.S. 48 26

Shelton v. Tucker, 364 U.S. 479. 34

Sims v. State Dept. of Public Welfare, 438 F.Supp. 1179 (S.D.Tex.) 22, 32, 40

Small Co. v. American Sugar Refining Co., 267 U.S. 233. 25

Smith v. Goguen, 415 U.S. 566 . . . . . 26, 27

Smith v. Organization of Foster Families, 431 U.S. 816. 24

Stanley v. Illinois, 405 U.S. 645 . . . . . .22, 23, 31

State ex rel. Brault v. Kyser, 562 S.W.2d 172 (Mo.App.) 15

State ex rel. Lemaster v. Oakley, 203 S.E.2d 140 (W.Va.Sup.) 24

Thompson v. Louisville, 362 U.S. 199. 38

In re Trapp, 528 S.W.2d 489 (Mo.App.) 13

United States v. National Dairy Products Corp., 372 U.S. 29 27

Windsor v. McVeigh, 93 U.S. 274 44

In re Winship, 397 U.S. 358 24

Zablocki v. Redhail, 434 U.S. 374 . . . . . .22, 29, 31

MISCELLANEOUS:

ABA Juvenile Justice Standards Project, Standards Relating to Abuse and Neglect (1977). . . . . .2[illegible], 29, 32, 33, 41

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Appellant.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

JURISDICTIONAL STATEMENT

The appellant, Linda Mae Trapp, appeals from the judgment of the Supreme Court of Missouri en banc, entered on January 15, 1980, affirming an order of the juvenile court below overruling appellant's motions to set aside the juvenile court's custody order of January 2, 1973, and its support order of February 27, 1973. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of Missouri en banc is reported in 593 S.W.2d 193. A copy of said opinion is attached hereto as Appendix A. In re Trapp, 528 S.W.2d 485 (Mo.App. 1975), is a related case.

JURISDICTION

This case was originally commenced in the juvenile division of the Circuit Court of Henry County, Missouri, on December 19, 1972, by the filing of a petition by the juvenile officer under §211.031 RSMo 1969 to have the juvenile court take jurisdiction of appellant's four minor children (Robert Emery Trapp, DOB 1-9-68; Sheryl Ann Trapp, DOB 4-25-69; Dee Ann Trapp, DOB 4-7-70; and Duane Edwin Trapp, DOB 9-8-72) as being in need of care and treatment under the supervision of the court.

A hearing was had on the petition on January 2, 1973, and thereupon the juvenile court entered an order of custody under §211.181 RSMo 1969, finding the children to be neglected children within the

meaning of the law, making them wards of the court, and vesting their care, custody, and control in the Welfare Department of Henry County, Missouri, until further order of the court.

Although no appeal was taken from the custody order, a number of additional proceedings have ensued in the case. On October 28, 1975, the juvenile court entered an order returning custody of appellant's eldest child, Robert, to her and her husband, and his custody is therefore not involved in this appeal.

On May 22, 1978, appellant filed a motion (Tr. 10-14) to set aside the custody order of January 2, 1973, and to dismiss the neglect petition. Therein appellant alleged (Tr. 12-14) that said order is null and void for the reasons, inter alia, that:

"C. [The juvenile court] was without jurisdiction to enter the custody order of January 2, 1973, because the statutes (§§211.031 and 211.181 RSMo 1969) on which said order was based are unconstitutional on their face and as applied because they operate to permit parents to be deprived of their fundamental liberty or right to the immediate companionship, care, custody, and management of their minor children in violation of the Due Process Clause of the Fourteenth Amendment in that:

"(1) The standards of 'proper support . . . or other care necessary for [the child's] well-being,' embodied in §211.031(1)(a); of 'otherwise without proper care, custody or support,' in §211.031(1)(b); and of 'behavior, environment or associations . . . injurious to [the child's] welfare or to the welfare of others,' in §211.031(1)(c), are unconstitutionally vague and overbroad because: (a) They do not, and did not here, give fair warning of what parental conduct is proscribed; (b) They permit, and permitted here, arbitrary and discriminatory separation of the child from the parents; and (c) They inhibit parents from freely and fully exercising their fundamental 'liberty' and 'privacy' rights in maintaining the integrity of their family and the rearing of their children.

"(2) The statutes (§§211.031 and 211.181 RSMo) are also unconstitutional on their face and as applied because they deny the parents substantive due process of law in that: (a) They do not require the State to balance its child-protection interest against the parents'

countervailing interest in being able to raise their children in an environment free from governmental interference; (b) They do not require the State to show by clear and convincing evidence that the child is subjected to a real and substantial degree of harm and that more harm is likely to befall the child by being permitted to remain with his parents than by being separated from them, so as to give the State the compelling state interest necessary to justify depriving the parents of the fundamental right to the custody of their children; and (c) They are not narrowly tailored to achieve only the State's compelling state interest in that they do not require the State to pursue less drastic alternatives, such as providing supervisory guidance to the parents and the child in the home, before resorting to separation of the child from the parents."

On May 30, 1978, appellant filed a motion (Tr. 15-17) to set aside the child support order entered by the juvenile court on February 27, 1973. Therein appellant alleged (Tr. 15) that said order is null and void for the reason , inter alia, that:

"A. [The juvenile court] was without jurisdiction under §211.241 RSMo 1969 to enter the support order of February 27, 1973, because the jurisdictionally prerequisite [custody] order of January 2, 1973, . . . was null and void for the reasons set forth in [appellant's] motion to set aside the custody order of January 2, 1973, which was filed herein on May 22, 1978 . . .."

On September 25, 1978, the juvenile court rejected the constitutional challenges to the statutes and entered an order overruling appellant's motion to set aside the custody order of January 2, 1973, and the child support order of February 27, 1973. On January 15, 1980, the Missouri Supreme Court entered its judgment affirming the juvenile court's order of September 25, 1978, upholding the constitutionality of the statutes. A copy of said judgment is attached hereto as Appendix B.

A timely motion for rehearing was filed, and said motion was overruled on February 11, 1980, by an order of the Missouri Supreme Court which is attached hereto as Appendix C.

Notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Missouri on February 26, 1980, and a

copy thereof is attached hereto as Appendix D.

Jurisdiction of this appeal is conferred on this Court by the provision of 28 U.S.C. §1257(2).

The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case: Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134 (1914); Charleston Federal Savings & Loan Ass'n. v. Alderson, 324 U.S. 182, 185-186 (1945); Raley v. Ohio, 360 U.S. 423, 436 (1959).

STATUTORY PROVISIONS INVOLVED

Sections 211.011, 211.031, 211.041, 211.091, 211.101, 211.171, 211.181, 211.241, 211.251 and 211.261 of the Revised Statutes of Missouri (RSMo) 1969, are set forth in Appendix E hereto.

QUESTIONS PRESENTED

I.

Are the Missouri parental neglect statutes (§§211.031 and 211.181 RSMo 1969) on which the juvenile court depended for its jurisdiction to enter the custody order of January 2, 1973, and the child support order of February 27, 1973, unconstitutional on their face and as applied because they operate to permit parents to be deprived of their fundamental liberty or right to the immediate companionship, care, custody, and management of their minor children in violation of the Due Process Clause of the Fourteenth Amendment in that:

A. The neglect standards embodied in §211.031(1)(a,b,c) —"proper support . . ., medical, surgical or other care necessary for [the child's] well-being," "otherwise without proper care, custody or support," and "behavior, environment or associations . . . injurious to [the child's] welfare or to the welfare of others" — are unconstitutionally vague and overbroad because: (1) They do not give fair warning of the parental conduct proscribed; (2) They permit arbitrary and discriminatory separation of the child from the parents; and (3) They inhibit the exercise of the parents' "liberty" and "privacy" rights in maintaining the integrity of their family and rearing their children?

B. The statutes (§§211.031 and 211.181 RSMo) are unconstitutional on their face and as applied because they deny substantive due process in that they do not require the State to balance its

child-protection interest against the strong countervailing interest of the parents, to wit: (1) The statutes do not require the State to show by clear and convincing evidence that the child is imminently subject to a substantial risk of suffering serious harm due to the culpable conduct of his parents and that more harm is likely to befall the child by being permitted to remain with his parents than by being separated from them, so as to give the State the compelling state interest necessary to justify depriving the parents of the fundamental right to the custody of their children; and (2) the statutes are not narrowly tailored to achieve only the State's compelling state interest in that they do not require the State to pursue less drastic alternatives, such as providing supervisory guidance to the parents and the child in the home, before resorting to separation of the child from the parents?

II.

Was the neglect petition insufficient to vest the juvenile court with jurisdiction to enter the custody order because the petition merely alleged neglect in the conclusory language of §211.031 RSMo 1969 and thus violated the requirement of §211.091 RSMo 1969 and of the Due Process Clause of the Fourteenth Amendment that such a petition must set forth the alleged factual basis for the proceeding?

III.

Is the custody order of January 2, 1973, constitutionally invalid and void because there was a total absence of competent and substantial evidence to support the juvenile court's finding of neglect, and said order therefore deprived appellant of her fundamental right to the immediate companionship, care, custody, and management of her children in violation of Due Process Clause of the Fourteenth Amendment?

IV.

Was appellant deprived of her fundamental right to the custody of her children without procedural due process of law in that the standard of proof of alleged neglect required by the statutes (§211.031 and 211.181 RSMo 1969) was a mere preponderance of the evidence rather than at least "clear and convincing" evidence?

V.

Does the juvenile court's finding in the custody order that the children were "neglected children within the meaning of the law and in need of care and protection," satisfy the due process requirement of the Fourteenth Amendment that the juvenile court must accompany its order with a statement of the reasons or considerations therefor, and set forth the basis for the order with sufficient specificity to permit meaningful review?

VI.

Is the juvenile court's child support order of February 27, 1973, invalid and void because the court was without jurisdiction to enter the order under §211.241 RSMo 1969 because the jurisdictionally prerequisite custody order of January 2, 1973, finding the children to be within the purview of the provisions of §211.031 RSMo 1969, was null and void for the reasons set forth in Question I(A,B) aforesaid?

VII.

Is the child support order of February 27, 1973, invalid because it was entered without notice and an opportunity to be heard on the issue of a monetary judgment for support of the children, and it thus deprived appellant of her property in violation of the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

As previously indicated, this case was originally commenced on December 19, 1972, when the juvenile officer of Henry County, Missouri, filed in the Juvenile Court of Henry County a printed form petition (Tr. 2) alleging in the language of §211.031 RSMo 1969 (See App. E, p. 1) that appellant's four children were under the age of 17, physically present in Henry County, Missouri, and in need of care and treatment under the supervision of the court because:

> "(a) The parents or other persons legally responsible for the care and support of the child have neglected and refused to provide proper support, education which is required by law, medical, surgical or other care necessary for the well being of said child.
>
> (b) Said child is otherwise without care, custody or support.

(c) The behavior, environment or associations of the child are injurious to his welfare or to the welfare of others."

On December 22, 1972, the juvenile court (Judge Kelso Journey) entered a temporary order (Tr. 2b), dated December 18, 1972, finding that the facts alleged in the juvenile officer's neglect petition were true and "that the best interests of said children require" that the Division of Welfare be given temporary custody of the children. Accordingly, the court granted temporary custody of the four children to the Division of Welfare and ordered that a hearing on the neglect petition be held on January 2, 1973, and that the parents be notified and summoned to appear.

Service of summons was had upon appellant but not upon her husband, and thereafter on January 2, 1973, Judge Journey entered the following order of custody under §211.181 RSMo 1969 (See App. E, pp. 2-3):

"Comes now Morran D. Harris, Juvenile Officer, and comes Linda Mae Trapp in person, and she being without funds to employ an attorney, the Court assigned George Lilleston to act as attorney for her and he appears, as well as Bill Edmonds, Child Welfare Aide, and Dr. Coleberd and associate physician and evidence is heard on the petition herein. The Court finds the four children herein are neglected children within the meaning of the law and are in need of the care and protection of the State of Missouri and are hereby made wards of this Court until further order. Said children's care, custody and control is hereby vested in the Welfare Department of Henry County, Missouri, until further order of this Court."

No stenographic notes or recording were requested or made of the hearing on January 2, 1973. However, as disclosed in the transcript of the subsequent proceedings to terminate parental rights in the related case of In re Trapp, 528 S.W.2d 489 (Mo.App. 1975), the matter of the testimony given at the neglect hearing on January 2, 1973, was fully covered at the trial of the termination case herein on April 29, 1974, at which both Dr. Coleberd and Mr. Edmonds testified. Said transcript, which was filed with the Missouri Supreme Court as an exhibit in this case, will hereinafter be referred to as "ExhTr."

From the opinion and transcript in that case, it appears that on August 10, 1972, Mrs. Trapp contacted the Henry County Welfare office seeking public assistance and employment for her husband. (ExhTr. 78) Mr. Trapp had been unemployed for some time except for occasional employment on Sundays at a filling station at $1.00 an hour. Mrs. Trapp was employed by Rival Manufacturing, but would have to quit soon because her doctor had advised her that her fourth child was due at any time. (ExhTr. 78-79) It was explained to her that since her husband was employable, and even though he could not find employment, she would not be eligible for Aid to Dependent Children or general relief so long as he was present in the home. (ExhTr. 78) Mrs. Trapp was then referred to the service worker who suggested that Mr. Trapp continue to make contact with a Mrs. Fletcher at "West Central" in regard to locating a job. (ExhTr. 78-79)

On September 8, 1972, the child, Duane Edwin Trapp, was born to Mr. and Mrs. Trapp at Golden Valley Hospital in Clinton, Missouri.

On October 20, 1972, Mrs. Trapp reapplied for Aid to Dependent Children, representing that Mr. Trapp left her a few days before the baby was born and that his whereabouts were unknown. Her immediate need was for food and she was given commodities. (ExhTr. 73, 76-77, 80-81)

On October 27, 1972, Mrs. Trapp's application for Aid to Dependent Children was approved at $158 per month. She subsequently received checks in that amount for November and December, 1972. (ExhTr. 79, 81)

Mr. Bill Edmonds testified that on November 2, 1972, Mrs. Trapp came to the welfare office in Clinton, Missouri, seeking food for her family and medical attention for the baby, Duane. Mr. Edmonds got a grocery order for her and followed her out to her home in Montrose, Missouri, where they picked up the baby and brought it back to the hospital in Clinton. (ExhTr. 36, 39) Mr. Edmonds testified that the baby couldn't keep any food down and that, as he recalled (on April 29, 1974), the illness the baby had on November 2, 1972, was "dehydration." (ExhTr. 37) In his written report made in November 1972 and introduced at the trial on April 29, 1974, in a folder marked Exhibit 2 (ExhTr. 33), Mr. Edmonds stated: "Dr. Coleberd

was the physician who attended the child and it was his opinion that the child was sick because Mrs. Trapp had changed the [baby's] formula. It seems that the child would not keep anything on its stomach and also had some diarrhea. Dr. Coleberd made a prescription to correct this and instructed the mother to keep the child on one particular formula."

The baby was not hospitalized. Mr. Edmonds testified that he picked up the prescription and took Mrs. Trapp and the baby back home that evening on November 2, 1972. (ExhTr. 40-41) Mr. Edmonds noted that the home in Montrose was a four-room house, that it was being heated only by a small Coleman cooking stove, and that the three older children (then 2, 3, and 4 years old) were inside the house dressed only in undershorts, although the weather outside was beginning to turn cold. (ExhTr. 38-39)

The case was first brought to the attention of the juvenile authorities by Dr. James C. Coleberd after seeing the oldest child, Robert, in the hospital in Clinton on December 15, 1972. Robert, who was then four years old, had been brought to the emergency department by his mother. He had been ill for two weeks, but Mrs. Trapp had not been aware of any pneumonia until she took him to the hospital. She had been unable to go sooner due to impassable roads. Examination by Dr. Coleberd, the Trapps' family physician, revealed a severely dehydrated child who was lethargic. The diagnosis was acute streptococcal pneumonia with severe dehydration. He was otherwise normal, but his condition was critical, life threatening. (ExhTr. 9-11) Dr. Coleberd thereupon notified the juvenile authorities because he "felt" that Robert was a neglected child. (ExhTr. 11-12, 22-23) Dr. Coleberd acknowledged that it is difficult for a lay person to distinguish dehydration as a sequela of pneumonia in its onset from less serious maladies, such as a chest cold or a fever of a relatively benign type (ExhTr. 15-16); that the dehydration could have had its onset as little as 24 to 48 hours before he saw the child (ExhTr. 18-19, 24-25); and that the dehydration could have been due to difficulty in swallowing because of a sore throat rather than any withholding of fluids (ExhTr. 27).

Dr. Coleberd saw the three younger children in December, 1972,

and found them in normal health and good condition. (ExhTr. 13-14, 17, 25-27)

On December 18, 1972, Mr. Edmonds received a complaint from the prosecuting attorney in connection with the hospitalization of Robert on December 15, 1972. (ExhTr. 43) On December 19, 1972, after the juvenile officer had submitted the petition and a temporary order placing the children in the care and custody of the Division of Welfare, Mr. Edmonds went out to the home to check on the situation as to the other three children. (ExhTr. 43, 51) Mrs. Trapp had moved and the home was now located in an isolated rural area east of Deepwater, Missouri, which was seven or eight miles from the hospital in Clinton. (ExhTr. 43, 48-49, 51) It was a two-room cabin which had formerly been used as a hunting lodge and had been acquired in condemnation proceedings by the Army Corps of Engineers in connection with the construction of the Truman Reservoir. (ExhTr. 49, 51) The roads were very bad at the time, and Mr. Edmonds had to borrow a jeep to get out there. (ExhTr. 45) The road conditions were such that you couldn't make it in an ordinary passenger car. (ExhTr. 48) Mrs. Trapp did not have a telephone and there were no close neighbors in the area. (ExhTr. 45, 49)

When Mr. Edmonds arrived at the home on December 19, 1972, he found Mrs. Trapp and the three younger children there. Although the three children [the oldest being age 3] were clothed in their underwear, the house was warm and there was plenty of firewood. There appeared to be plenty of food; "it was considerably a better situation than the first time" when they lived in Montrose. (ExhTr. 45, 52) The three children were in good health and appeared to be well-fed, well-nourished, and clean. (ExhTr. 45, 65, 68) "Other than being maybe scantilly clothed," the children appeared to be receiving proper care. (ExhTr. 68) Mr. Edmonds recommended to Mrs. Trapp that she move from this isolated area and find a place in town which would be closer to medical facilities. (ExhTr. 45) Mr. Edmonds did not feel that the children were in any apparent danger, so he left them in the home with their mother. (ExhTr. 51)

Mrs. Trapp testified that she was unaware that Robert was suffering from pneumonia until the night she got out to take him to the

hospital when the road got good enough to drive out, and that she was unable to get out before that "because it was muddy and we had that ice, snow and everything." (ExhTr. 125)

Mr. Edmonds testified that both Mr. and Mrs. Trapp were unemployed at the time of the hearing on January 2, 1973, when Judge Journey entered the order of custody. (ExhTr. 47-48) Mr. Edmonds further testified that Mr. and Mrs. Trapp were still unemployed at the time of their "reconciliation" when they resumed living together on or about January 27, 1973, and it was not until after that, that they obtained employment. (ExhTr. 64-65, 73) He testified moreover that he discussed employment with both Mr. and Mrs. Trapp and had knowledge that Mrs. Trapp got a job at Wiley's Cafe and Mr. Trapp went to work for Meyerco in Clinton sometime in February, 1973. (ExhTr. 54-55)

On February 27, 1973, Judge Journey entered an order (Tr. 3-4) finding that the three youngest Trapp children "are deprived of proper financial support while in foster care due to the falsification of information on the part of the natural parents of said children;" ordering that the Trapp parents "who are gainfully employed," pay support for said children in the amount of $198.00 per month or $66.00 per child, commencing March 5, 1973, and that this amount be garnisheed from the wages of the parents through the Henry County Circuit Clerk; and directing the sheriff to serve the parents with a copy of said order. On March 5, 1973, a summons with the order attached was issued and delivered to the sheriff, and on March 14, 1973, he made return of service of the summons on Mr. and Mrs. Trapp. (Tr. 4a)

On March 16, 1973, Mr. and Mrs. Trapp filed a motion for rehearing (Tr. 4a-5) to regain custody of their children on the ground that they had met the terms of the custody order of January 2, 1973, that they were to be heard regarding the custody of their children at such time as they were gainfully employed and able to provide adequate food, clothing and shelter.

Also on March 16, 1973, execution was issued against Mr. and Mrs. Trapp under the support order of February 27, 1973, and their employers were subjected to garnishment proceedings returnable

April 16, 1973.

On March 26, 1973, Mr. and Mrs. Trapp offered evidence on their motion seeking custody of their children. The motion was denied notwithstanding recommendation by child welfare worker Fritts that custody be restored to Mr. and Mrs. Trapp.

On April 23, 1973, Mrs. Trapp's employer deposited $80.36 on garnishment of her wages, and the court ordered it paid to Henry County in reimbursement of monies paid out on behalf of the Trapp children. Judgment was rendered against Mr. Trapp's employer on its failure to respond to the execution and on May 23, 1973, $45.84 was paid into court. This sum was also ordered paid to Henry County in reimbursement of support monies paid for the Trapp children.

At the time of the garnishment, Mrs. Trapp was clearing less than $37.00 per week, and the $80.36 represented more than two weeks' wages. The $117.64 for which judgment was entered against Mr. Trapp's employer represented what he cleared every two weeks; however, only $45.84 was returned because that was all that was due him when his employment was terminated upon his arrest on April 16, 1973.

On April 14, 1973, Mr. and Mrs. Trapp were charged by information with the felony of stealing $86.00 from the Department of Welfare by deceit in falsely representing that Mr. Trapp was absent from the household when he actually was in the home, in order to obtain Aid to Dependent Children. Mr. Trapp was arraigned April 16, 1973, and was committed to jail to await trial in lieu of $1,000 bond. Mrs. Trapp likewise was arraigned and committed to jail on April 27, 1973.

On May 18, the charge was reduced to the misdemeanor of stealing under $50.00. Both Mr. and Mrs. Trapp pleaded guilty, were sentenced to a year in the Henry County jail and placed on probation for two years conditioned upon good behavior and payment of costs (including room and board while in jail) within six months and payment of $474.00 to the Department of Welfare within one year. Upon their release, Mr. and Mrs. Trapp went to the Henry County Welfare Office, reported the terms of their probation, and renewed their request for the return of their children.

In June, 1973, Mr. Trapp went to work for Royal Transports in

Kansas City, Missouri, making $140 to $160 per week. On June 28, 1973, Mr. and Mrs. Trapp initiated an effort through the Jackson County Welfare Office to obtain return of their children. Their request was again denied because of Judge Journey's position that the judgment for child support and the monetary terms of their probation had to be satisfied in full before custody of the children would be returned to the parents.

As previously indicated, on January 3, 1974, the Henry County juvenile officer filed a petition in this case to terminate the parental rights of Mr. and Mrs. Trapp under §§211.441 et seq. RSMo 1969. Trial was held on April 29, 1974, and thereupon Judge Journey entered a judgment terminating their parental rights. The parents appealed and the Missouri Court of Appeals, Western District, reversed the judgment on September 2, 1975, in In re Trapp, supra, 528 S.W.2d 489 (Mo.App. 1975).

During pendency of the appeal, in July of 1974 the Henry County Office of the Division of Family Services placed the child, Sheryl Ann Trapp, in the licensed foster home of David L. and Judy E. Bridgeman. On October 8, 1974, the Bridgemans filed a petition for adoption of Sheryl Ann in case No. J-1847 in the Circuit Court of Henry County, Missouri, and on October 15, 1974, Judge Journey entered an order granting them temporary legal custody pursuant to that petition.

Likewise during pendency of the appeal, on October 15, 1974, Judge Journey also entered an order granting temporary legal custody of the child, Dee Ann Trapp, to Joseph W. and Lois A. Petty pursuant to their petition for adoption in case No. J-1848 in the Circuit Court of Henry County, Missouri; and then on December 16, 1974, Judge Journey entered an order granting temporary legal custody of the child, Duane Edwin Trapp, to Ronald D. and Carol J. Johnson pursuant to their petition for adoption in case No. 74-335J in the Circuit Court of Bates County, Missouri.

On October 28, 1975, after the decision in In re Trapp, supra, came down, Judge Journey entered an order in this case returning the care, custody and control of the fourth child, Robert Emery Trapp, to his parents "in view of the opinion of the Missouri Court of Appeals

[in said case];" but requesting the Missouri Division of Family Services to make a home study of the parents as to the return of the three remaining children whom he had preliminarily placed in adoption. (Tr. 5-6)

On December 27, 1975, the Trapp parents filed a motion to set aside the custody order of January 2, 1973, and the support order of February 27, 1973, or in the alternative for a hearing to restore custody of the three remaining children to the parents. (Tr. 6-10)

Thereafter, the Trapp parents moved to vacate the proceedings in each of the three pending adoption cases. On April 12, 1976, Judge Journey set aside the proceedings by Ronald D. and Carol J. Johnson for the adoption of Duane Edwin Trapp in case No. 74-335J in the Circuit Court of Bates County, transferred jurisdiction of said child back to the Circuit Court of Henry County, and revested legal custody in the Henry County Office of the Division of Family Services under the custody order of January 2, 1973, in this case. On April 26, 1976, Judge Journey set aside the proceedings by David L. and Judy E. Bridgeman for the adoption of Sheryl Ann Trapp and the proceedings by Joseph W. and Lois A. Petty for the adoption of Dee Ann Trapp in cases No. J-1847 and No. J-1848, respectively, in the Circuit Court of Henry County, and revested legal custody of said children in the Henry County Office of the Division of Family Services under the order of January 2, 1973, in the instant case. The Bridgemans, the Pettys, and the Johnsons have taken no appeal from the judgments dismissing their respective petitions for adoption.

On April 27, 1976, the Bridgemans filed in this case a motion for leave to intervene accompanied by proposed petition to intervene which included a prayer for termination of parental rights to Sheryl Ann Trapp. This Bridgeman motion was granted ex parte on April 28, 1976.

On April 29, 1976, the Trapp parents filed an application for change of judge on their motion (filed herein on December 27, 1975) to set aside the custody order of January 2, 1973, and the support order of February 27, 1973; and on May 28, 1976, Judge Journey granted the application. On June 1, 1976, the Missouri Supreme Court assigned Judge H. A. Kelso, of the Vernon County Circuit Court at Nevada,

Missouri, in place of Judge Journey in the Circuit Court of Henry County at Clinton, Missouri.

On June 15, 1976, the Trapp parents moved to set aside the ex parte order granting the Bridgemans leave to intervene and for a new order denying the intervention. On February 7, 1977, the Bridgemans filed a new motion to intervene accompanied by a petition to intervene which, unlike their first petition, did not seek the termination of parental rights. On February 22, 1977, Judge Kelso having retired, the Missouri Supreme Court returned the jurisdiction of the case to Judge Harold A. Kyser, who had succeeded Judge Journey in the Circuit Court of Henry County. On February 25, 1977, Judge Kyser granted the petition of the Bridgemans to intervene.

Following this, on April 29, 1977, the Henry County juvenile officer filed in this case a new petition to terminate parental rights to the child, Sheryl Ann Trapp. In response thereto, appellant filed an application for change of judge which Judge Kyser denied on June 10, 1977. Pursuant to a petition for writ of prohibition, change of judge on the termination petition was granted appellant by the Missouri Court of Appeals, Western District, on January 30, 1978, in State ex rel. Brault v. Kyser, 562 S.W.2d 172 (Mo.App. 1978). In due course the Missouri Supreme Court assigned Judge Don W. Kennedy of the Circuit Court of Vernon County to conduct the termination of parental rights proceeding in the Juvenile Court of Henry County.

On March 28, 1978, appellant filed herein a motion to dismiss the second petition to intervene, which the Bridgemans were given leave to file on February 25, 1977, on the grounds that notice was not properly given and that the juvenile court is without jurisdiction to entertain such a petition in this case.

On June 7, 1978, the Bridgemans filed their third motion to intervene in this case (Tr. 17-19). Therein they stated that the motion was being filed "for the purpose of clarifying the records and relieving the Appellate Court of the necessity of considering [the] matters [raised by appellant with respect to their previous interventions]." They then alleged that they are licensed foster parents and that Sheryl Ann Trapp resides with them in Phelps County, Missouri, by authority of the Henry County Office of the Division of

Family Services, which placed the child with them (in July of 1974); that they are "desirous" of adopting said child; and that they "have a direct and substantial interest in this proceeding in that the Court's ruling herein could have the possible effect of terminating their right to petition for adoption of said child and to merely maintain said child in their home as a foster child."

On July 14, 1978, appellant filed suggestions in opposition to the Bridgemans' third motion to intervene (Tr. 19-20) on the ground, inter alia, that permitting the Bridgemans to intervene and their attorney to participate in this action would be inherently and fundamentally unfair, potentially prejudicial, and contray to public policy.

On March 31, 1978, appellant filed in the termination proceeding before Judge Kennedy a motion to dismiss the petition to terminate parental rights to Sheryl Ann Trapp on the grounds that the juvenile court has no jurisdiction to proceed thereon because at the time of the filing of the petition on April 29, 1977, Sheryl Ann was neither a resident of nor found within Henry County as required by §211.031 RSMo, and the court's order of January 2, 1973, making said child a ward of the court and placing her in the legal custody of the Henry County Office of the Division of Family Services is null and void for want of jurisdiction for reasons which are alleged by appellant in the instant neglect proceeding before Judge Kyser.

On May 22, 1978, appellant filed in the neglect proceeding before Judge Kyser a motion to set aside the custody order of January 2, 1973, and to dismiss the neglect petition (Tr. 10-14); and on May 30, 1978, a motion to set aside the child support order of February 27, 1973 (Tr. 15-17).

In the motion filed on May 22, 1978, to set aside the custody order of January 2, 1973, appellant alleged (Tr. 10-14) that said order is null and void for the reasons that the juvenile court was without jurisdiction to enter the order because:

> (A) The special, limited statutory jurisdiction of the juvenile court to enter such an order does not appear on the face of the record inasmuch as (1) the neglect petition on which the order was entered wholly failed to state "[t]he facts which

bring the child within the jurisdiction of the court," as required by §211.091 RSMo 1969, and (2) the court in said order wholly failed to "make a finding of fact upon which it exercise[d] its jurisdiction over the child," as required by §211.181 RSMo 1969;

(B) As disclosed in the opinion and the transcript on appeal in the related case of In re Trapp, 528 S.W.2d 489 (Mo. App. 1975), the custody order of January 2, 1973, was totally devoid of evidence to support any finding that the children were in need of care and treatment under §211.031 RSMo 1969, and said order therefore violated the Trapp parents' fundamental liberty or right to the immediate companionship, care, custody, and management of said children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and

(C) The statutes (§§211.031 and 211.181 RSMo 1969) on which the custody order of January 2, 1973, was based are unconstitutional on their face and as applied because [they violate the Due Process Clause of the Fourteenth Amendment as heretofore set forth (ante at 2-3) in the statement of the grounds on which the jurisdiction of this Court is invoked]; and said statutes are also unconstitutional as applied because they denied the Trapp parents procedural due process of law in that: (a) Pleading the mere language of §211.031 did not satisfy the notice requirement of due process that the neglect petition must contain the alleged factual basis for the proceeding as well as the legal standard authorizing the separation of the child from the parents; and (b) The standard of proof required was a mere preponderance of the evidence rather than at least "clear and convincing" evidence.

In her motion filed on May 30, 1978, to set aside the support order of February 27, 1973, appellant alleged (Tr. 15-17) that the support order is null and void for the reasons that the juvenile court was without jurisdiction under §211.241 RSMo 1969 (See App. E, p. 3) to enter said order because:

(A) The jurisdictionally prerequisite order of January 2, 1973, finding the children to be within the purview of the

provisions of §211.031, was null and void for the reasons set forth in appellant's motion (filed herein on May 22, 1978) to set aside said custody order of January 2, 1973;

(B) As appears on the face of the record, the juvenile court lacked the special, limited statutory jurisdiction necessary to enter the support order of February 27, 1973, inasmuch as (1) the Trapp parents neither voluntarily appeared, not were they summoned to appear, for said proceeding to inquire into their ability to support or to contribute to the support of said children, as required by §211.241(1) RSMo 1969, and (2) the court made no finding that the parents were able to support or to contribute to the support of said children, as required by §211.241(2) RSMo 1969; and

(C) As alleged in the motion which the Trapp parents filed herein on December 27, 1975 (Tr. 6-10 at 8), it is apparent on the face of the record that said support order is constitutionally invalid because it was made in excess of the court's jurisdiction and in a patently irregular manner in that it was entered without affording the parents notice and an opportunity for a prior hearing and it thereby deprived them of their property in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (Tr. 16)

On September 14, 1978, appellant served a notice (Tr. 20-21) calling up for hearing on September 25, 1978, all motions pending in the neglect proceeding before Judge Kyser, including the Bridgemans' third motion for leave to intervene filed herein on June 7, 1978 (Tr. 17-19); appellant's motion filed herein on December 27, 1975, to set aside the custody order of January 2, 1973, and the support order of February 27, 1973 (Tr. 6-10); her motion filed herein on May 22, 1978, to set aside said custody order and dismiss the neglect petition (Tr. 10-14); and her motion filed herein on May 30, 1978, to set aside the support order of February 27, 1973 (Tr. 15-17).

On September 25, 1978, a hearing was had on the motions (Tr. 22-60), and thereupon Judge Kyser entered a judgment and order granting the Bridgemans' third motion for leave to intervene and overruling all of appellant's motions herein (Tr. 59-61). The case was then

duly and timely appealed to the Supreme Court of Missouri.

The Questions presented herein, ante at 4-6, were presented and briefed in the Missouri Supreme Court as follows:

1. Question I and the subsidiary Questions I(A) and I(B) were presented and briefed as Point I and subsidiary Points I(C)(1) and I(C)(2) at pages 45 and 53 of Appellant's Brief.

2. Question II was presented and briefed under Points I(A)(1) and I(C)(3)(a) at pages 37 and 56 of Appellant's Brief.

3. Question III was presented and briefed as Point I(B) at page 43 of Appellant's Brief.

4. Question IV was presented and briefed under Points I(A)(2) and I(C)(3)(b) at pages 37 and 56 of Appellant's Brief.

5. Question V was presented and briefed as Point I(A)(2) at page 37 of Appellant's Brief.

6. Question VI was presented and briefed as Point II(A) at page 59 of Appellant's Brief.

7. Question VII was presented and briefed under Points II(B) and II(C) at pages 60 and 62 of Appellant's Brief.

In its opinion (Appendix A) the Missouri Supreme Court held: (1) That the standards for neglect in §211.031 RSMo are not unconstitutionally vague and overbroad, and that due process does not require the neglect statutes to embody the standard of harm urged by appellant; (2) That the neglect petition couched in the language of the statute satisfied the notice requirements of due process and was adequate to vest the juvenile court with jurisdiction to enter the custody order; (3) That the juvenile court's finding of neglect was not totally without evidentiary support so as to violate federal due process; (4) That due process does not require the State to prove alleged neglect by "clear and convincing" evidence rather than a mere preonderance of the evidence; and (5) That the finding of the juvenile court that the children were "neglected children within the meaning of the law and in need of care and protection," satisfied the requirements of due process as established in Kent v. United States, 383 U.S. 541 (1966) and in In re Gault, 387 U.S. 1 (1966).

The majority of the Missouri Supreme Court further held, over the dissent of three of the seven judges, that the child support

order entered on February 27, 1973, without further hearing after the custody proceeding at which appellant appeared on January 2, 1973, was valid and did not violate appellant's due process rights to notice and an opportunity to be heard before entry of the monetary support order against her.

In conclusion, the Missouri Supreme Court affirmed the juvenile court's order of September 25, 1978, overruling appellant's motions to set aside the custody order of January 2, 1973, and the support order of February 27, 1973. The Court reversed that portion of the juvenile court's order of September 25, 1978, granting the Bridgemans' motion to intervene in the custody proceedings, and further ordered Judge Kyser to enter an order disqualifying himself from presiding over further proceedings concerning the custody of appellant's children.

Thus, the validity of the Missouri neglect statutes are drawn in question on the ground of their being repugnant to the Constitution of the United States, and the decision of the Missouri Supreme Court is in favor of their validity so that the Supreme Court of the United States has jurisdiction of this appeal under 28 U.S.C. §1257(2).

THE QUESTIONS ARE SUBSTANTIAL

I.

THE MISSOURI PARENTAL NEGLECT STATUTES (§§211.031 and 211.181 RSMo 1969) ON WHICH THE JUVENILE COURT DEPENDED FOR ITS JURISDICTION TO ENTER THE CUSTODY ORDER OF JANUARY 2, 1973, AND THE CHILD SUPPORT ORDER OF FEBRUARY 27, 1973, ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED BECAUSE THEY OPERATE TO PERMIT PARENTS TO BE DEPRIVED OF THEIR FUNDAMENTAL LIBERTY OR RIGHT TO THE IMMEDIATE COMPANIONSHIP, CARE, CUSTODY, AND MANAGEMENT OF THEIR MINOR CHILDREN IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IN THAT:

A. THE NEGLECT STANDARDS EMBODIED IN §211.031(1)(a,b,c) — "PROPER SUPPORT . . ., MEDICAL, SURGICAL OR OTHER CARE NECESSARY FOR [THE CHILD'S] WELL-BEING," "OTHERWISE WITHOUT PROPER CARE, CUSTODY OR SUPPORT," AND "BEHAVIOR, ENVIRONMENT OR ASSOCIATIONS . . . INJURIOUS TO [THE CHILD'S] WELFARE OR TO THE WELFARE OF OTHERS" — ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD BECAUSE: (1) THEY DO NOT GIVE FAIR WARNING OF THE PARENTAL CONDUCT PROSCRIBED; (2) THEY PERMIT

ARBITRARY AND DISCRIMINATORY SEPARATION OF THE CHILD FROM THE PARENTS; AND (3) THEY INHIBIT THE EXERCISE OF THE PARENTS' "LIBERTY" AND "PRIVACY" RIGHTS IN MAINTAINING THE INTEGRITY OF THEIR FAMILY AND REARING THEIR CHILDREN.

As the United States Supreme Court has made clear, the loss of a fundamental constitutional "liberty" or right is at stake in proceedings to deprive parents of the companionship, care, custody, and management of their minor children. In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), the Court announced that the "liberty" guaranteed by the Fourteenth Amendment "[w]ithout doubt, . . . denotes . . . the right of the individual . . . to marry, establish a home and bring up children." Similarly, in Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925), the Court affirmed the enjoining of an Oregon statute which was deemed to interfere "with the liberty of parents and guardians to direct the upbringing and education of children under their control." In Prince v. Massachusetts, 321 U.S. 158, 166 (1944), the Court noted that "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. * * * And it is in recognition of this that these decisions [Meyer and Pierce] have respected the private realm of family life which the state cannot enter."

In May v. Anderson, 345 U.S. 528, 533 (1953), the Court denied full faith and credit to an ex parte custody decree, noting that the Fourteenth Amendment's liberty included a parent's "immediate right to the care, custody, management and companionship of . . . minor children." In Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639 (1974), the Court observed that the "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."

In Roe v. Wade, 410 U.S. 113, 152-153 (1973), the Court pointed out that a constitutional right of personal privacy extends to "activities relating to marriage, procreation, contraception, family relationships, and child rearing and education," and that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."

And the Court further expressed its belief that this right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." See also Carey v. Population Services International, 431 U.S. 678, 684-685 (1977); Zablocki v. Redhail, 434 U.S. 374, 384-385 (1978).

In Stanley v. Illinois, 405 U.S. 645, 652 (1972), the Court in considering the constitutional dimensions of an unwed father's right to the custody of his children, said:

> "The private interest here, that of a man and the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' * * *
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> "The Court has frequently emphasized the importance of the family. The rights to conceive and raise one's children have been deemed 'essential,' . . . 'basic civil rights of man' . . . and 'rights far more precious . . . than property rights' . . .. * * * The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment . . .." (Citations omitted.)

The inescapable conclusion from the foregoing is that the parent's right to the immediate companionship, care, custody, and management of his or her children is a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment. See Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10, 15-16 (S.D.Ia. 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976); Roe v. Conn, 417 F.Supp. 769, 778, 779 (M.D.Ala. 1976)(three judge court); Sims v. State Dept. of Public Welfare, 438 F.Supp. 1179, 1190 (S.D.Tex. 1977); Davis v. Paige, 442 F.Supp. 258, 261-262 (S.D.Fla. 1977). It is also apparent that the Fourteenth Amendment's deferential protection is not limited to permanent or final deprivations of that fundamental right such as result form proceedings to terminate parental rights. Indeed, in

Stanley v. Illinois, supra, 405 U.S. at 647, the Supreme Court rejected such a suggestion and held that such protection extended to a dependency proceeding in which the deprivation of the right to custody was temporary or nonfinal. In doing so, the Court observed that in the interim between the removal and the regaining of the custody of the children, the parent "suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation."

The same is true of a neglect proceeding such as the instant one. As pointed out in Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977): "[Such a proceeding is] concerned with the most essential and basic aspect of familial privacy — the right of the family to remain together without the coercive interference of the awesome power of the state. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the 'companionship, care, custody, and management of his or her children,' Stanley v. Illinois, 405 U.S. 645, 651 (1972), and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent, Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977)."

It is well recognized that the State's removal of a child from the parent in a neglect proceeding is a drastic action. Roe v. Conn, supra, 417 F.Supp. at 778 n. 9; R. v. Superior Court, 19 Cal.App.3d 895, 97 Cal.Rptr. 158, 162-163 (1971). The loss which accompanies the State's action is quite grievous and substantial for both the child and the parent. The generally prevailing view is that most children have strong psychological attachments to their parents, and when those ties are broken by separation, the child suffers short-term trauma and pain and possibly long-term emotional damage. See the American Bar Association Juvenile Justice Standards Project's Standards Relating to Abuse and Neglect (1977), Commentary at 124.[1] Reciprocally, most parents view the loss of custody in such a proceeding as dire punishment. R. v. Superior

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[1] These Standards Relating to Abuse and Neglect were among seventeen volumes of Standards for Juvenile Justice approved by the American Bar Association's House of Delegates at its Mid-Year Meeting in 1979. See 48 U.S. Law Week 2527-2528.

Court, supra, 97 Cal. Rptr. at 162. In fact, such loss of the right to custody of one's child may be viewed as a sanction more severe than imprisonment. State ex rel. Lemaster v. Oakley, 203 S.E.2d 140, 144 (W.Va. 1974); Danforth v. State Department of Health and Welfare, 303 A.2d 794, 800 (Me. 1973). Indeed, it has been recognized that the right of a parent to the custody and companionship of his child is "more precious to many people than the right of life itself." In re Myricks, 85 Wash.2d 252, 533 P.2d 841, 842 (Banc 1975); In re Luscier, 84 Wash.2d 135, 524 P.2d 906, 908 (Banc 1974).

The theoretical "temporary" separation, moreover, may well prove to be quite prolonged. Under §211.041 RSMo 1969 (App. E, p. 1), the State may retain custody of the child until he reaches the age of 21; and while under §211.251 RSMo 1969 (App. E, p. 3) a parent may petition the juvenile court at any time for a modification of the custody order, the court may in its discretion deny the petition without even a hearing. Cf. Davis v. Paige, supra, 442 F.Supp. at 265. See also Smith v. Organization of Foster Families, 431 U.S. 816, 834-836 (1977).

In ruling that the neglect standards embodied in §211.031 RSMo 1969 are not unconstitutionally vague and overbroad, the Missouri Supreme Court (App. A, p. 11) followed the holding in Minor Children of F.B. v. Caruthers, 323 S.W.2d 397, 401 (Mo.App. 1959). It should be noted that the Caruthers court prefaced its holding with the statement that "since no crime has been charged . . . and since the purpose of the proceeding is . . . not to punish, the constitutional guarantees [against vagueness] in respect to criminal cases do not apply." 323 S.W.2d at 399-400. In effect the Caruthers court distinguished the proceedings in question here from criminal cases by use of what the United States Supreme Court in In re Gault, 387 U.S. 1, 50 (1967), called the "'civil' label-of-convenience which has been attached to juvenile proceedings." But, as the Supreme Court pointed out in In re Winship, 397 U.S. 358, 365 (1970), "Gault expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding." And as the Court declared in Breed v. Jones, 421 U.S. 519, 529 (1975), "it is clear under our cases that determining . . . the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew

the 'civil' label-of-inconvenience which has been attached to juvenile proceedings, and that 'the juvenile process . . . be candidly appraised.'"

Moreover, in Small Co. v. American Sugar Refining Co., 267 U.S. 233, 238-242 (1925), the Court held that the due process guarantee against vagueness applies with equal force to statutes in "civil" as well as "criminal" cases. Referring to criminal cases wherein the statutes were held void for vagueness, the Court said at 239: "The defendant [like the Caruthers court] attempts to distinguish those cases because they were criminal cases. But that is not an adequate distinction. The ground or principle of th[ose] decisions was not . . . applicable only to criminal prosecutions. It was not the criminal penalty which was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all."

In striking down a statute under which the defendant was assessed court costs of $230.95 after acquittal in Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966), the Court reiterated the point:

> "* * * Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statutes. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague.
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> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. * * *" (Emphasis added.)

In other words, as the Court stated in Connally v. General Construction Co., 269 U.S. 385, 391 (1926), "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process

of law."

In Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972), the Court set forth the elemental principles of the void-for-vagueness doctrine:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas are clearly marked.'"

The Supreme Court, moreover, has made it clear that the void-for-vagueness doctrine requires a greater degree of specificity where the statute threatens the exercise of a fundamental right. Rose v. Locke, 423 U.S. 48, 50 n. 3 (1975); Smith v. Goguen, 415 U.S. 566, 572-573 (1974). While the Court was speaking in the context of the First Amendment, the principle is equally applicable here. As heretofore seen, the Court has made it clear that it is a fundamental right which is affected by the parental neglect statutes. Indeed, the right to the custody of one's own children, free from unwarranted state interference, may be viewed as a right even more basic and precious to a parent than freedom of speech. In such a case, unlike in cases dealing with purely economic regulation, the question of vagueness must be determined from the statute "on its face" without

regard to the conduct to which it is applied. See Smith v. Goguen, supra, 415 U.S. at 573 n. 10. Compare United States v. National Dairy Products Corp., 372 U.S. 29, 36 (1963).

The neglect standards embodied in §211.031 RSMo 1969 (App. E, p. 1) — "proper support . . ., medical, surgical, or other care necessary for [the child's] well-being," "otherwise without proper care, custody or support," and "behavior, environment, or associations . . . injurious to [the child's] welfare or to the welfare of others" — are plainly susceptible to multifarious interpretations which prevent the ordinary person from knowing what conduct is prohibited, and afford state officials with so much discretion in their application that arbitrary and discriminatory deprivations of parental custody are inevitable.

What is meant by "proper care"? According to Webster's New International Dictionary, 2d Ed., the word "proper" may mean: "appropriate; suitable; right; fit; * * * correct; * * * conforming to the best usage ethically or socially." What then is proper care? Is it correct care? Fit care? Appropriate care? Care consistent with propriety? Is propriety to be determined ethically, socially, or economically? Or on the basis of morality? Or prosperity? Is the standard a maximum, a minimum, a mean, or an average? As held with respect to a neglect standard of "proper parental care," in Roe v. Conn, supra, 414 F.Supp. 769, 780: "Obviously, this is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views. Because these terms are too subjective to denote a sufficient warning to those individuals who might be affected by their proscription, the statute is unconstitutionally vague." And as held with respect to a standard of a "proper home," in Davis v. Smith, 583 S.W.2d 37, 43-44 (Ark.Sup. 1979), such a standard is unconstitutionally vague because it means one thing to one judge, something else to another, and something yet different to still another.

The same is true of the Missouri neglect standards of "care necessary for [the child's] well-being," and of an "environment . . . injurious to [the child's] welfare." Webster's Third New International

Dictionary defines the word "well-being" as "the state or condition of being well; a condition characterized by happiness, health or prosperity; moral or physical welfare." And it defines the word "welfare" as "the state of faring or doing well; thriving or successful progress in life; a state characterized esp. by good fortune, happiness, well-being, or prosperity; * * * a social optimum."

The Missouri standard of "care necessary for [the child's] well-being," is essentially the same as the Iowa parental termination standard of "necessary parental care and protection," which was struck down as unconstitutionally vague in Alsager v. District Court of Polk County, Iowa, supra, 406 F.Supp. at 17-21. The Missouri standard is also similar to the Alabama parental neglect standard that custody of the child may be taken when "its welfare requires," which was likewise struck down in Roe v. Conn, supra, 414 F.Supp. at 777-778.

The Missouri neglect standard of an "environment . . . injurious to [the child's] welfare," is also essentially the same as the Iowa standard of "[parental] conduct . . . detrimental to the physical or mental health or morals of a child," which was struck down as unconstitutionally vague in Alsager, supra, 406 F.Supp. at 17-21.

The question arises in this case as to when is a home an "environment . . . injurious to [the child's] welfare" under the Missouri statute. Is a substandard or otherwise inadequate home such an "environment"? If it is, then there are millions of American families whose children could potentially be adjudged neglected on that count. See 42 U.S.C.A. §§1441, 1441a of the National Housing Act. Is a home without running water such an "environment"? Is a home in an isolated rural area such an "environment"? If it is, then there are still a good number of parents who could lose custody of their children for that reason. Does this standard apply to parents who are unable to provide an adequate home because of their poverty? The Missouri Supreme Court here indicated that it does. (App. A, pp. 3-4, 10 n. 10) But such a view that parents may be deprived of their constitutionally protected right to custody of their children solely because of their indigency, is totally unprecedented and inconsistent with our tradition of administering justice

equally to the rich and to the poor. See the concurring opinions of Mr. Justice Powell and Mr. Justice Stevens in the case of Zablocki v. Redhail, supra, 434 U.S. at 402-403 and 404-405.

The Missouri Supreme Court suggests (App. A, p. 11) that the neglect standards are necessarily broad and imprecise because of the many ways in which the need of children for care may arise, but this contention is not well founded. Such vagueness not only should but can be cured by defining the grounds for state intervention in terms of specific harms to the child so as to permit the State to intervene only when the child is and will continue to be imminently subject to a substantial risk of serious harm as a result of the culpable conduct of his parents, and more harm is likely to befall the child by remaining with his parents than by being separated from them, as has been done in the ABA Standards Relating to Abuse and Neglect (ante at 23 n. 1).[2]

While the facial defect of vagueness in a statute can be cured

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[2] As pointed out in the Commentary to the ABA Standards Relating to Abuse and Neglect, supra, at 40-41:

"The present resort to vague, general statutes is unacceptable for a number of reasons. Most importantly, by failing to identify the specific harms which justify intervention, such laws increase the likelihood that decisions will be made to intervene in situations where the child will be harmed by intervention. It has become increasingly clear in recent years that coercive intervention can be harmful to children as well as helpful. * * * This is especially true when intervention leads to removal of the child from the home. * * * Therefore, it is necessary to provide specific guidelines to courts and social work agencies regarding those types of harm which justify intervention and that define the situations in which intervention is likely to be beneficial to the child.

"Moreover, vague laws facilitate arbitrary, and even discriminatory, intervention. Unless the bases for intervention are clearly defined, each social worker and judge can make his/her own value judgments about those harms which justify intervention. There is substantial evidence that such decisions sometimes involve imposing middle class values upon poor families without taking into account different cultural patterns of child rearing. Vague laws also result in unequal treatment of similarly situated persons. Again, it must be recognized that such arbitrary intervention not only is violative of basic values in our society, it may also be quite harmful to the children who are being 'protected.'

"Finally, all intervention involves value judgments about appropriate childrearing practices and value choices about where and how a child should grow up. Considering the seriousness of the decision to intervene, intervention should be permissible only where there is a clear-cut decision, openly and deliberately made by responsible political bodies, that the type of harm involved justifies intervention. Such value judgments should not be left to the individual tastes of hundreds of nonaccountable decisionmakers." (Citations omitted."

by judicial construction restricting the vague standards to constitutionally permissible bounds, the Missouri appellate courts have not undertaken to make any such restrictive construction. In the great majority of the decisions involving an application of the parental neglect standards, the Missouri courts have simply made a determination as to the substantiality of the evidence to support a finding based on those standards.

§211.031 RSMo 1969 is also unconstitutionally vague as applied. The statute did not give appellant fair warning that it prohibited her from permitting her small children to be dressed only in undershorts ~~shirts~~ while inside the house.[3] Or from living in a house without running water. Or from living in a two-room cabin on land that had been condemned. Or from living in an isolated rural area.

Thus, contrary to the opinion of the Missouri Supreme Court, the neglect standards embodied in §211.031 RSMo 1969, are unconstitutionally vague, both on their face and as applied, in that (1) they do not, and did not here, give fair warning of what parental conduct is proscribed; (2) they permit, and permitted here, arbitrary and discriminatory separation of the child from the parent; and (3) they inhibit parents from freely and fully exercising their fundamental "liberty" and "privacy" rights in maintaining the integrity of their family and rearing their children. See Alsager, supra, 406 F.Supp. at 21; Roe v. Conn, supra, 417 F.Supp. at 778-780. See also Alsager, supra, 545 F.2d 1137, 1138, where the Eighth Circuit Court of Appeals in affirming the decision of the District Court on other grounds (which will hereinafter be presented in the instant case), felt compelled to note that the vagueness and overbreadth attacks on the facial validity of such statutory standards are "serious ones," and that the placing of a limiting construction upon such provisions is "plainly desirable."

B. THE STATUTES (§§221.031 AND 211.181 RSMo) ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED BECAUSE THEY DENY SUBSTANTIVE DUE PROCESS IN THAT THEY DO NOT REQUIRE THE STATE TO BALANCE ITS

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[3] Compare Alsager, supra, 406 F.Supp. at 22, where the prohibited conduct of which the Iowa statute did not give the Alsager parents fair warning, including permitting their children to leave the house in cold weather without winter clothing on.

CHILD-PROTECTION INTEREST AGAINST THE STRONG COUNTERVAILING INTEREST OF THE PARENTS, TO WIT: (1) THE STATUTES DO NOT REQUIRE THE STATE TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE CHILD IS IMMINENTLY SUBJECT TO A SUBSTANTIAL RISK OF SUFFERING SERIOUS HARM DUE TO THE CULPABLE CONDUCT OF HIS PARENTS AND THAT MORE HARM IS LIKELY TO BEFALL THE CHILD BY BEING PERMITTED TO REMAIN WITH HIS PARENTS THAN BY BEING SEPARATED FROM THEM, SO AS TO GIVE THE STATE THE COMPELLING STATE INTEREST NECESSARY TO JUSTIFY DEPRIVING THE PARENTS OF THE FUNDAMENTAL RIGHT TO THE CUSTODY OF THEIR CHILDREN; AND (2) THE STATUTES ARE NOT NARROWLY TAILORED TO ACHIEVE ONLY THE STATE'S COMPELLING STATE INTEREST IN THAT THEY DO NOT REQUIRE THE STATE TO PURSUE LESS DRASTIC ALTERNATIVES, SUCH AS PROVIDING SUPERVISORY GUIDANCE TO THE PARENTS AND THE CHILD IN THE HOME, BEFORE RESORTING TO SEPARATION OF THE CHILD FROM THE PARENTS.

As heretofore seen, the interest of a parent in the companionship, care, custody, and management of his children is one of the most fundamental rights protected by the Constitution. As the Supreme Court pointed out in Roe v. Wade, 410 U.S. 113, 115 (1973): "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake." Similarly, in Zablocki v. Redhail, supra, 434 U.S. 374, 388 (1978), the Court declared: "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." In other words, a State "may abrogate such rights only to advance a compelling state interest and pursuant to a narrowly-drawn statute restricted to achieve only the legitimate objective." Roe v. Conn, supra, 417 F.Supp. at 779.

As held in Stanley v. Illinois, supra, 405 U.S. 645, 652 (1972), the interest of a parent in the companionship, care, custody, and management of his or her children "undeniably warrants deference and, absent a powerful countervailing interest, protection." Thus while the State has a legitimate interest in protecting children, that

interest must be balanced against the parents' strong countervailing interest in being able to raise their children in an environment free from unwarranted government interference. Alsager, supra, 406 F.Supp. at 22. Due process therefore requires the showing of a certain threshhold of harm to the child to give the State a "child-protection interest" compelling enough to justify the deprivation of parental custody. Id. at 22-23. "Without danger of immediate harm or threatened harm to the child, the State's interest in protecting the child is not sufficient to justify a removal of the child [from his parents]." Roe v. Conn, supra, 417 F.Supp. at 778. The State's burden is to show that the harm to which the child is subjected is real and substantial. Id. at 779. And to have an interest "compelling" enough to curtail the parents' rights, the State must show that more harm is likely to befall the child by remaining with his parents than by being separated from them. Alsager, supra, 406 F.Supp. at 24, aff'd, 545 F.2d 1137 (8th Cir. 1976).

The Missouri Supreme Court indicated (App. A, p. 10) that such a standard of harm is limited to permanent or final deprivations of custody such as result from proceedings to terminate parental rights. But in Roe v. Conn, supra, 417 F.Supp. at 777-778, the standard was applied in the context of a proceeding to temporarily remove the child from his parents, as well as a proceeding to terminate parental rights. So, too, in a neglect proceeding in Sims v. State Dept. of Public Welfare, 438 F.Supp. 1179, 1193-1194 (S.D.Tex. 1977), the three-judge court held that the State was required to show "by clear and convincing evidence" that the State's taking of custody "is necessary to protect the child from physical injury." The court did not strike down the Texas statute in this respect, however, because the statute allowed the State to take custody of a child in order "to protect him from an immediate danger to his health or physical safety." The court held that such language represents a constitutionally adequate standard, and noted (Id. at 1192 n. 14) that the standard is far more acceptable than that of the Alabama statute which provided for taking custody of the child when "its welfare requires," and was found unconstitutional in Roe v. Conn, supra.

Moreover, as previously indicated (ante at 29), the ABA Standards

Relating to Abuse and Neglect, ante at 23, embody the standard that the State should be authorized to intervene only when the child is and will continue to be imminently subject to a substantial risk of serious harm as a result of the culpable conduct of his parents, and more harm is likely to befall the child by remaining with his parents than by being separated from them. (See Standards 1.1, 1.2, 1.3, and 2.1.)

The Missouri neglect statutes provide no such restrictive standard, and by the same token, require no threshhold of harm. On the contrary, §211.011 RSMo 1969 (App. E, p. 1) declares that the purpose of the Juvenile Courts Chapter "is to facilitate the care, protection, and discipline of children," and proceeds to speak in expansive terms of removal "to the end that each child coming within the jurisdiction of the juvenile court shall receive such care . . . as will conduce to the child's welfare and the best interests of the state." Thus, as this case demonstrates, the Missouri Act on its face permits the removal of a child from his parents without any showing that the child is suffering, or will be imminently subject to a substantial risk of suffering serious harm due to culpable conduct of his parents, if left with them.

As previously seen (ante at 8-10), the only harm being suffered by any of the four children at the time the petition was filed on December 19, 1972, was the streptococal pneumonia for which the oldest child was taken to the hospital by his mother on December 15, 1972. But there was no evidence that the pneumonia was due to his mother's neglect. The three younger children involved on this appeal were all found at the time to be in good health, well-fed, well-nourished and clean. The matter of changing the baby's formula which caused the illness for which he received out-patient medical attention on November 2, 1972, had obviously been corrected. There simply was no evidence of any risk of harm to which the three younger children, and the oldest child upon his release from the hospital, would be subjected if left with their mother.

Thus, the Missouri neglect statutes (§§211.031 and 211.181 RSMo) are unconstitutional on their face and as applied because they deny substantive due process in that they permit deprivations of parental custody without the showing of a level of harm sufficient to give

the State a "child-protection interest" compelling enough to justify such separations.

Furthermore, it is a familiar and basic principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964). In a series of decisions, the Supreme Court has held that, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960). "[T]he Constitution requires that the powers of government 'must be so exercised as not, in attaining a permissible end, unduly to infringe' a constitutionally protected freedom." Aptheker, supra, 378 U.S. at 509.

Section 211.181 RSMo 1969 (App. E, pp. 2-3), however, does not require the State to pursue less drastic alternatives, such as providing supervisory guidance to the parents and the child in their home, before resorting to separation of the child from the parents. See Roe v. Conn, supra, 417 F.Supp. at 779. See also Alsager, supra, 406 F.Supp. at 24 n. 19. The Missouri neglect statutes therefore "sweep too broadly" and again deny due process both on their face and as applied in the instant case.

II.

THE NEGLECT PETITION WAS WHOLLY INSUFFICIENT TO VEST THE JUVENILE COURT WITH JURISDICTION TO ENTER THE CUSTODY ORDER BECAUSE THE PETITION MERELY ALLEGED NEGLECT IN THE CONCLUSORY LANGUAGE OF §211.031 RSMo 1969 AND THUS VIOLATED THE REQUIREMENT OF §211.091 RSMo 1969 AND OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT SUCH A PETITION MUST SET FORTH THE ALLEGED FACTUAL BASIS FOR THE PROCEEDING.

As heretofore seen (ante at 6-7), the printed form neglect petition in this case merely alleged in the language of §211.031 RSMo 1969 that the parents "have neglected and refused to provide

proper support, . . . medical, surgical, or other care necessary for the well-being of said child," that said child "is otherwise without care, custody or support," and that "the behavior, environment or associations of the child are injurious to his welfare or to the welfare of others." As held in In re Gault, 387 U.S. 1, 31-33 (1967), a petition alleging in general conclusory terms that the child is "neglected, dependent or delinquent" does not satisfy the notice requirements of due process. In this regard, the Supreme Court stated, 387 U.S. at 33-34:

> " * * * Notice, to comply with due process requirements must be sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' * * * [Due process] require[s] that the child and his parents . . . be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given . . . sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described -- that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet." (Emphasis added.)

In other words, as the Court pointed out, 387 U.S. at 17 n. 22, "notice of issues" is one of the constitutional requirements of due process which apply in "civil" as well as "criminal" proceedings.[4]

It should be noted that Gault held that due process required that the above-described notice be given to the parents as well as the child in such a case; such notice was required to be given to the child because his freedom was involved, and to the parents

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[4] Another, but not the sole, notice requirement of due process in any case is that the form of the notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendancy of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover B. & Tr. Co., 339 U.S. 306, 314 (1950); Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

because their right to custody of the child was at stake in the delinquency proceeding. The same parental right to custody is involved in a neglect proceeding. Indeed, the deprivation of parental custody which may be at stake in a neglect proceeding is as great as that which was at stake in Gault.[5] By the same token, the applicability of the holding of Gault with respect to the parents' due process right to adequate notice of the factual basis for the proceeding to deprive them of custody, cannot be denied on the ground that in Gault the child's freedom was at stake, while here it is not.

The rationale of the due process requirement that the petition must notify the parents of the factual basis for the proposed deprivation of parental custody, is well stated in City of Raytown v. Roach, 360 S.W.2d 741, 743 (Mo.App. 1966), with reference to the sufficiency of the complaint in a municipal ordinance prosecution: "The prime purpose of such a pleading (as can be said of the petition in any civil action) is to inform the defendant of the nature of the action lodged against him in order that he may defend against it. * * * He should not be required to guess at what he is to defend against or speculate as to the meaning of the allegations in the complaint [* * * nor have any] difficulty in determining what evidence would be admissible under them . . . ."

Measured against this notice requirement of due process, the petition here fails to pass constitutional muster. By no stretch of the imagination can the petition be construed to have notified appellant of any specific charge or factual situation she would need to prepare to defend against. The petition did not inform her of whether she would have to meet the general conclusory charge of: (1) neglect to provide proper support; or of (2) neglect to provide necessary medical care; or of (3) neglect to provide other (unspecified) care necessary for the children's well-being; or of (4, 5, 6) permitting the children to be otherwise without proper care, or custody, or support; or of (7, 8, 9) permitting the behavior, or the environment, or the associations of the children to be injurious

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[5] In a delinquency proceeding the parents may be deprived of the custody of the child until he reaches the age of 21 and becomes emancipated. See Gault, 387 U.S. at 36-37. In a neglect proceeding the juvenile court may retain jurisdiction of the child until he reaches the age of 21. See §211.041 RSMo 1969 (App. E, p. 1).

to their welfare or that of others.

Even if the petition had made clear which of these general charges were lodged against appellant, it would not have informed her of the specific issues of fact she would have to meet. This would plainly be true if, for example, the petition had clearly charged her with neglect to provide medical or other care necessary for the children's well-being, because the need for care "may arise in so many ways," Minor Children of F.B. v. Caruthers, 323 S.W.2d 397, 401 (Mo.App. 1959), and there are so "many diverse circumstances which give rise to a finding of neglect . . .." In re Neglected Child, 130 Vt. 525, 296 A.2d 250, 254 (1972).

Contrary to the view adopted by the Missouri Supreme Court (App. A, p. 7), such a general charge does not constitute an allegation of facts. As clearly recognized in Missouri Supreme Court Rule 114.01 V.A.M.R.,[6] such a charge constitutes a "standard of conduct," as distinguished from "the facts" which are the acts, including the time, place and manner thereof, which allegedly violate the standard of conduct. By the same token, the petition here did not "set forth plainly . . . [t]he facts which bring the child within the jurisdiction of the court," as required by §211.091(2) RSMo 1969 (App. E, p. 1).

Failing, as it did, to comply with the mandate of §211.091 and the due process requirement of notice of issues, the neglect petition was wholly insufficient to give the juvenile court jurisdiction to proceed to enter the custody order of January 2, 1973.

III.

THE CUSTODY ORDER OF JANUARY 2, 1973, IS CONSTITUTIONALLY INVALID AND VOID BECAUSE THERE WAS A TOTAL ABSENCE OF COMPETENT AND SUBSTANTIAL EVIDENCE TO SUPPORT THE JUVENILE COURT'S FINDING OF NEGLECT, AND SAID ORDER THEREFORE DEPRIVED APPELLANT OF HER FUNDAMENTAL RIGHT TO THE IMMEDIATE COMPANIONSHIP, CARE, CUSTODY, AND MANAGEMENT OF HER CHILDREN IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

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[6] Rule 114.01(b)(3) provides that the petition in a neglect proceeding "shall set forth plainly and concisely, with reasonable particularity . . . the facts which bring the juvenile within the jurisdiction of the juvenile court, including the date, place and manner of the acts and the law or standard of conduct, if any, allegedly violated by the acts."

As previously seen, it is clear that the right of a parent to the immediate companionship, care, custody, and management of his or her minor children is a fundamental "liberty" protected by the Due Process Clause of the Fourteenth Amendment. It is also well recognized that where a judgment depriving a person of liberty or property is totally devoid of evidentiary support, such a judgment is constitutionally invalid and void under the Due Process Clause and may be collaterally attacked. Thompson v. Louisville, 362 U.S. 199 (1960); Garner v. Louisiana, 368 U.S. 157 (1961); Cunha v. Brewer, 511 F.2d 894, 898[1-3] (8th Cir. 1975); Dupree v. Wyrick, 415 F.Supp. 168, 169[3] (E.D.Mo. 1976); Cobb v. Wyrick, 379 F.Supp. 1287, 1295[8,9] (W.D.Mo. 1974).

The evidence to which the Missouri Supreme Court refers in its opinion does not amount to even a scintilla of evidence that the children were suffering or were likely to suffer any harm as a result of neglect by the parents to provide medical or other care necessary for the children's well-being or of the environment maintained by the parents. The State's own evidence discloses that there was no neglect to provide necessary care: Dr. Coleberd testified that Mrs. Trapp brought the oldest child, Robert, to the hospital on December 15, 1972, to receive necessary treatment for the streptococcal pneumonia which he had contracted (ExhTr. 9), and Mr. Edmonds testified that she had sought medical attention for the illness of the youngest child, Duane, on November 2, 1972 (ExhTr. 36-37).

Mr. Edmond's testimony that the youngest child was diagnosed on November 2, 1972, as suffering from "dehydration" (ante at 8-9), does not give rise to any legitimate inference that the child's illness was due to the environment of the child or the neglect of the parents to provide necessary care. As pointed out by the medical authorities in Home Health Guide and Medical Encyclopedia (Home Library Press, 1960), pp. 49, 550: "Dehydration is a body state in which [there is a] loss of an abnormal quantity of water from the body. It may result from perspiration in warm weather or from disease. Fever, diarrhea, or excess urination cause excessive amounts of water to pass from the system." As to the youngest child's condition on November 2, 1972, Mr. Edmonds in his written report made in November, 1972, and introduced in evidence as an exhibit, stated: "Dr. Coleberd

was the physician who attended the child and it was his opinion that the child was sick because Mrs. Trapp had changed the [baby's] formula. It seems that the child would not keep anything on its stomach and also had some diarrhea. Dr. Coleberd made a prescription to correct this and instructed the mother to keep the child on one particular formula." The baby was not hospitalized but was returned home with his mother by Mr. Edmonds on the same day (ExhTr. 40-41). The problem with the formula was obviously corrected, for Dr. Coleberd testified that he saw the baby and the other two of the three younger children involved here in December 1972, and found them to be in normal health and good condition (ExhTr. 13-14, 17, 25-57), and Mr. Edmonds testified that the three younger children were in good health and appeared to be well-fed, well-nourished, and clean when he saw them on December 19, 1972, the day the neglect petition was filed (ExhTr. 45, 65, 68).

The evidence that the oldest child, Robert, was suffering from acute streptococcal pneumonia in both lung fields (ante at 9) likewise fails to give rise to any legitimate inference that his condition was due to the environment maintained by the parents or any neglect by them to provide necessary care.[7] Contrary to the popular misconception, pneumonia is not caused by exposure to cold. As pointed out in Home Health Guide and Medical Encyclopedia, supra, at pp. 196-197:

> "Pneumonia is an infection of the air spaces of the lungs. There are many different types . . .. Lobar pneumonia is a type caused by pneumococcal bacteria, hemolytic streptococci, and occasionally by Friedlander's bacillus. It is characterized by involvement of one or more entire lobes of the lungs. * * * Pneumonia may also be caused by a variety of other organisms and conditions — tularemia, rheumatic fever, fungi, foreign bodies in the lungs or bronchial tubes, aspiration of mucous or pus, or other materials from the throat — or by nearly any other

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[7] Contrary to the view indicated by the Missouri Supreme Court (App. A, p. 10 n. 10), it is not enough that the child is suffering serious harm; that harm must also be due to the culpable conduct of the parents. Obviously, the fact that a child is suffering a life-threatening illness is not in itself reason for the State to take the child from his parents.

type of bacteria that gains a foothold through lowered resistance in the patient. * * * Lowered resistance due to any cause may lay the groundwork for the development of pneumonia." Moreover, Mr. Edmonds testified that, unlike the house in which the children were living in November, the hunting cabin in which they were living in December when Robert contracted pneumonia was warm inside; "it was considerably a better situation . . .." (ExhTr. 45) And of further significance is the fact that the other three children, who were living in the same environment under the same parental care, not only had not contracted pneumonia but were admittedly in good health and appeared to be well-fed, well-nourished, and clean.

Thus it appears that there was a total absence of substantial evidence to support any finding that the three younger children involved here, and the oldest child upon his release from the hospital, were or would be subjected to any risk of harm, if left with their parents. The custody order of January 2, 1973, is therefore constitutionally invalid and void under the Due Process Clause of the Fourteenth Amendment.

IV.

APPELLANT WAS DEPRIVED OF HER FUNDAMENTAL RIGHT TO THE CUSTODY OF HER CHILDREN WITHOUT PROCEDURAL DUE PROCESS OF LAW IN THAT THE STANDARD OF PROOF OF ALLEGED NEGLECT REQUIRED BY THE STATUTES (§211.031 and 211.181 RSMo 1969) WAS A MERE PREPONDERANCE OF THE EVIDENCE RATHER THAN AT LEAST "CLEAR AND CONVINCING" EVIDENCE.

Although proof by clear and convincing evidence is required in proceedings to terminate parental rights under §§211.441 et seq., RSMo 1969, no such requirement is found in §§211.031 and 211.181 RSMo 1969, or the reported cases dealing with the latter sections. In other words, the standard of proof required under the Missouri neglect statutes is proof by a mere preponderance of the evidence.

In its opinion (App. A, p. 10), the Missouri Supreme Court took the position that the "clear and convincing" standard of proof is not required as a matter of due process in a neglect proceeding. But as held in Sims v. State Dept. of Public Welfare, supra, 438 F.Supp. at 1194, and Alsager v. District Court of Polk County, Iowa, supra, 406 F.Supp. at 25, where the fundamental right of a parent to the

custody of his child is at stake in either a neglect or a termination proceeding, due process of law requires at the very least that the State prove its case by "clear and convincing" evidence.

Standard 6.4C.2. of the ABA Standards Relating to Abuse and Neglect (ante at 23) provides for the "clear and convincing" standard of proof in proceedings to remove the child from his parents. The applicability of this standard of proof to a neglect proceeding is further supported by the reasoning and the holding of the Supreme Court in Addington v. Texas, 441 U.S. 418 (1979). In that case, the Court held that due process requires such a standard of proof in civil commitment proceedings because the possible injury to the individual is significantly greater than any possible harm to the state. The Court furthermore pointed out that the "clear and convincing" standard has been applied in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing, in order to reduce the risk to the defendant of having his reputation tarnished erroneously.

By the same token, appellant was deprived of her fundamental right to the custody of her children without procedural due process of law in that the State was not required to prove the alleged neglect by clear and convincing evidence.

V.

THE JUVENILE COURT'S FINDING IN THE CUSTODY ORDER THAT APPELLANT'S CHILDREN "ARE NEGLECTED CHILDREN WITHIN THE MEANING OF THE LAW AND IN NEED OF CARE AND PROTECTION," DOES NOT SATISFY THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT THAT THE JUVENILE COURT MUST ACCOMPANY ITS ORDER WITH A STATEMENT OF THE REASONS OR CONSIDERATIONS THEREFOR, AND SET FORTH THE BASIS FOR THE ORDER WITH SUFFICIENT SPECIFICITY TO PERMIT MEANINGFUL REVIEW.

As heretofore seen (ante at 6-7), the neglect petition alleged in the language of §211.031(1) RSMo 1969 (App. E, p. 1) that appellant had violated the provisions of subdivisions (a), (b), and (c) thereof. Section 211.181 RSMo 1969 (App. E, p. 2) provides that "When a child is found by the court to come within the provisions of section 211.031, the court shall so decree and make a finding of of fact upon which it exercises its jurisdiction over the child . . .." In its custody order of January 2, 1973 (ante at 7), the

juvenile court merely made a finding that the children herein "are neglected children within the meaning of the law and are in need of care and protection."

Such a finding wholly fails to indicate not only what acts appellant was found to have committed but which provisions of the statute she was found to have violated. And yet, as heretofore seen (ante at 23-24), the loss which accompanies the custody order is quite grievous and substantial. Such being the case, due process requires that the juvenile court accompany the order with a statement of the reasons or considerations therefor, and set forth the basis for the order with sufficient specificity to permit meaningful review. Kent v. United States, 383 U.S. 541, 561 (1966). Contrary to the Missouri Supreme Court's opinion (App. A, p. 8), the juvenile court's finding did not satisfy that requirement.

VI.

THE JUVENILE COURT'S CHILD SUPPORT ORDER OF FEBRUARY 27, 1973, IS INVALID AND VOID BECAUSE THE COURT WAS WITHOUT JURISDICTION TO ENTER THE ORDER UNDER §211.241 RSMo 1969 BECAUSE THE JURISDICTIONALLY PREREQUISITE CUSTODY ORDER OF JANUARY 2, 1973, FINDING THE CHILDREN TO BE WITHIN THE PURVIEW OF THE PROVISIONS OF §211.031 RSMo 1969, WAS NULL AND VOID FOR THE REASONS SET FORTH UNDER QUESTIONS I(A) AND I(B) AFORESAID.

The jurisdiction of the juvenile court to enter the support order of February 27, 1973, is derived from and confined to the authority given by §211.241 RSMo 1969 (App. E, p. 3). In pertinent part, §211.241 provides: "When the juvenile court finds a child to be within the purview of the applicable provisions of Section 211.031 it may in the same or subsequent proceedings . . . proceed to inquire into the ability of the parent of the child to support it or to contribute to its support. * * * If the court finds that the parent is able to support the child or to contribute to its support, the court may enter an order requiring the parent to support the child or to contribute to its support . . .." (Emphasis added.)

Thus it appears that §211.241 authorizes the juvenile court to proceed to enter such a support order only after making a finding under §211.181 that the child comes within the provisions of §211.031.

In other words, the custody order of January 2, 1973, was a jurisdictional prerequisite for the juvenile court to enter the support order of February 27, 1973. And since the custody order of January 2, 1973, is null and void for the reasons set forth under Questions I(A) and I(B) aforesaid, the support order of February 27, 1973, is invalid and void.

VII.

THE CHILD SUPPORT ORDER OF FEBRUARY 27, 1973, IS INVALID BECAUSE IT WAS ENTERED WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE ISSUE OF A MONETARY JUDGMENT FOR SUPPORT OF THE CHILDREN, AND IT THUS DEPRIVED APPELLANT OF HER PROPERTY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

As previously indicated, this point is supported by Chief Justice Bardgett in his dissenting opinion (App. A, pp. 14-16), which was concurred with in the separate opinions of Judges Seiler and Higgins (App. A, p. 16).

The original neglect petition was served upon appellant but not upon her husband, Mr. Trapp. The petition merely sought to have the juvenile court take jurisdiction of the children on the ground that they were neglected, and it contained no claim against appellant for child support.

Appellant personally appeared at the hearing on January 2, 1973, and thereupon the juvenile court entered the custody order (ante at 7) making the children wards of the court. The custody order made no reference whatsoever to the matter of child support.

The record further shows that on February 27, 1973, without any prior notice to Mr. and Mrs. Trapp and without their being personally present, the juvenile court entered an order directing that Mr. and Mrs. Trapp "who are gainfully employed," pay support for said children in the amount of $198.00 per month or $66.00 per child. (See App. A, p. 15.)

The majority of the Missouri Supreme Court (App. A, p. 9) relied on the provision of §211.241(1) RSMo 1969 (App. E, p. 3) authorizing the juvenile court to inquire into the parents' ability to make support payments either in the initial custody proceedings or in subsequent proceedings, and the majority assumed in the

absence of a transcript, that such an inquiry was made at the hearing on January 2, 1973. But in doing so, the majority overlooked the fact that although the juvenile court may have such authority, there is still the due process matter of notice to the parents.

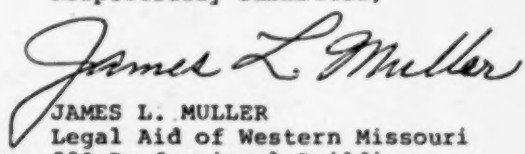
As held in Reynolds v. Stockton, 140 U.S. 254, 270-271 (1891), it is a well settled proposition "that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must . . . be responsive to the issues tendered by the pleadings. In other words, . . . when a complaint tenders one cause of action, and in that suit service on, or appearnce of, the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force . . .." Indeed, "A judgment upon a matter outside of the issue [tendered must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated." Id. at 268-269. Cf. Windsor v. McVeigh, 93 U.S. 274 (1876). See also Chief Justice Bardgett's dissenting opinion herein (App. A, pp. 14-16).

It follows that the child support order of February 27, 1973, is invalid because it was entered without notice and an opportunity to be heard on the issue of a monetary judgment for support of the children, and it thus deprived appellant of her property in violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set this case for plenary briefing and argument.

Respectfully submitted,



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APPENDIX A

(Opinion of Supreme Court of Missouri)

In the Matter of Sheryl Ann TRAPP, Dee Ann Trapp, and Duane Edwin Trapp.

Robert Emery Trapp, Father, Linda Mae Trapp, Mother and Appellant,

David L. and Judy E. Bridgeman, Intervenors-Respondents.

No. 61076.

Supreme Court of Missouri, En Banc.

Jan. 15, 1980.

Rehearing Denied Feb. 11, 1980.

Natural mother appealed from a judgment of the Circuit Court, Henry County, Harold A. Kyser, J., overruling her motion to set aside a custody order and a child support order. The Supreme Court, Welliver, J., held that: (1) trial court's judgment was final for purposes of appeal, despite trial court's failure to dispose of natural mother's motion that requested a hearing into her fitness to regain custody of the children; (2) neglect petition, served on mother, satisfied notice requirements of due process; (3) neglect petition couched in language of statute defining juvenile court's jurisdiction was adequate to vest court with jurisdiction to enter custody order; (4) juvenile court's finding that children were neglected children within meaning of law and were in need of care and protection comported with requirement that juvenile court make a finding of fact on which exercise of its jurisdiction is based; (5) statute setting forth standards for neglect was not unconstitutionally vague or overbroad; and (6) foster parents, who had physical custody of child, did not have requisite interest relating to the subject of the action to intervene as of right.

Reversed in part and affirmed in part.

Bardgett, C. J., concurred in part and dissented in part and filed opinion.

Seiler, J., concurred in part and dissented in part and filed opinion.

Higgins, J., dissented and filed opinion.

1. Infants ⇐16.14

Trial court's orders overruling natural mother's motions to set aside orders giving custody of her children to Division of Family Services and ordering her and her husband to pay child support would be treated as final judgment for purposes of appeal, despite trial court's failure to dispose of her motion that requested a hearing into her fitness to regain custody of the children.

2. Infants ⇐16.7

Notice required in a neglect proceeding is that notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. V.A.M.S. §§ 211.031, 211.181; U.S.C.A.Const. Amend. 14.

3. Infants ⇐16.7

Neglect petition served on mother satisfied notice requirements of due process, where such petition was adequate to notify her of the pendency of the custody proceedings, make clear that the charges against which she would need to defend were those of failure to provide proper support, of neglect to provide medical or other care necessary for children's well being, or maintaining an environment injurious to welfare of children or others. V.A.M.S. §§ 211.031, 211.181; U.S.C.A.Const. Amend. 14.

4. Infants ⇐16.6

Neglect petition couched in language of statute defining juvenile court's jurisdiction was adequate to vest court with jurisdiction to enter custody orders. V.A.M.S. § 211.091.

5. Infants ⇐16.10

Juvenile court's finding that children were neglected children within meaning of law and were in need of care and protection comported with requirement that juvenile court make a finding of fact on which exercise of its jurisdiction is based. V.A.M.S. § 211.181.

6. Constitutional Law ⇐306(2)
Infants ⇐16.10

Juvenile court's findings of fact in entering custody orders satisfied requirements

of due process. V.A.M.S. §§ 211.031, 211.181; U.S.C.A.Const. Amend. 14.

7. Infants ⇐16.10

Juvenile court's finding of neglect was not totally without evidentiary support, where record indicated a child welfare aide and a physician were present at hearing and that evidence was heard on the neglect petition. V.A.M.S. §§ 211.031, 211.171, subd. 4, 211.181.

8. Constitutional Law ⇐306(2)
Infants ⇐16.12

Child support order entered without further hearing after custody proceeding at which parent appeared was valid as to such parent and did not violate either statute authorizing juvenile court to enter such an order or constitutional due process. V.A.M.S. § 211.241; U.S.C.A.Const. Amend. 14.

9. Constitutional Law ⇐48(3)

A statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly and undoubtedly violates some constitutional provision.

10. Constitutional Law ⇐258(2)

A statute violates due process clause of Fourteenth Amendment when it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. U.S.C.A.Const. Amend. 14.

11. Constitutional Law ⇐258(2)

Even in case of a statute that defines a criminal offense, due process requires no more than that statute convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. U.S.C.A.Const. Amend. 14.

12. Infants ⇐12

Statute setting forth standards for neglect was sufficiently clear and definite to inform and warn parent of common intelligence of level of child care which state required and expected and thus such statute was not unconstitutionally vague or overbroad. V.A.M.S. §§ 211.031, 211.031, subds. 1(1), 1(1)(a–c), 211.091, 211.181, 211.251; V.A.M.R. Juv.Ct. Rule 121.01.

13. Parent and Child ⇐2(18)

Foster parents, who had physical custody of child, did not have requisite interest relating to subject matter of action to intervene as of right in proceeding by natural mother to regain custody of her children; foster parents' allegation that court's ruling could frustrate their desire to adopt the child was not an immediate and direct claim upon very subject matter of the proceeding. V.A.M.S. § 507.090, subd. 1; V.A.M.R. Civil Rules 52.12, 52.12(a)(2).

14. Parties ⇐40(2)

Although rule authorizing intervention as of right was changed to facilitate determination of all related disputes in one proceeding, and thereby avoid a multiplicity of actions, the change in the rule did not dispense with the requirement that applicant have an interest in the subject matter of the litigation. V.A.M.R. Civil Rule 52.12(a).

15. Parent and Child ⇐2(7)

Statute permitting court in child custody proceedings to order that person, who has physical custody of child, be joined did not confer right on foster parents having physical custody of child to intervene in a custody proceeding based on allegations of neglect or abandonment of the child by the natural parents. V.A.M.S. § 452.485.

16. Judges ⇐51(1)

Trial judge, who had been prohibited by Court of Appeals from presiding on further proceedings on petition for termination of parental rights, was also required to disqualify himself from presiding over further custody proceedings involving same parties and same children and to request that Supreme Court make assignment of judge in the matter. V.A.M.S.Const. art. 5, § 4; V.A.M.R. Code of Judicial Conduct, Canon 2.

James L. Muller, Kansas City, for appellants.

William J. Cason, Michael X. Edgett, Fred R. Bunch, Clinton, William L. Curry, Juvenile Officer, Clinton, for intervenors-respondents.

WELLIVER, Judge.

The appellant, Linda Mae Trapp, is the natural mother of three children who are presently in the legal custody of the Missouri State Division of Family Services. She appeals from the judgment of the juvenile division of the Circuit Court of Henry County entered September 25, 1978, overruling her motions to set aside a custody order entered January 2, 1973, and a child support order entered February 27, 1973. She also appeals from the order allowing the foster parents (the Bridgemans, intervenors-respondents) to intervene in the proceedings. Appellant alleges error in the denial of her motions on the ground that the court had no jurisdiction to enter the original custody and support orders and on the ground that the statutes providing the juvenile court with jurisdiction in neglect proceedings are unconstitutional both on their face and as applied to appellant. Appellant also contends that permitting foster parents to intervene in the custody proceedings is without basis in either Rule 52.12 or the Juvenile Code because they do not have a legal interest that would be affected by the proceedings and because their participation would be unfair and against public policy. That portion of the September 25, 1978, order that overruled appellant's motions to set aside the 1973 custody and support orders will be affirmed; the portion that sustained respondents' motion to intervene will be reversed.

On December 19, 1972, the juvenile officer of Henry County, Missouri, filed a petition in the Henry County Juvenile Court alleging that four of appellant's children, Robert Emery Trapp, Sheryl Ann Trapp, Dee Ann Elaine Trapp and Duane Edwin Trapp, were under the age of 17, physically present in Henry County, Missouri, and in need of care and treatment under the supervision of the court because:

> (a) The parents or other persons legally responsible for the care and support of the children have neglected and refused to provide proper support, education which is required by law, medical, surgical or other care necessary for the well being of said child[ren].
>
> (b) The child[ren] are otherwise without care, custody or support.
>
> (c) The behavior, environment or associations of the child[ren] are injurious to [their] welfare or to the welfare of others.

On December 22, 1972, the juvenile court entered its temporary order finding that the facts alleged in the juvenile officer's neglect petition were true and "that the best interests of said children require" that the Division of Welfare be given temporary custody of the children. Accordingly, the court granted temporary custody of the four children to the Division of Welfare and ordered that a hearing on the neglect petition be held on January 2, 1973, and that the parents be notified and summoned to appear.

On January 2, 1973, appellant appeared personally and through her court-appointed attorney, and evidence on the neglect petition was heard. On the same day, the court entered the following findings and order:

> The Court finds the four children herein are neglected children within the meaning of the law and are in need of the care and protection of the State of Missouri and are hereby made wards of this Court until further order. Said children's care, custody and control is hereby vested in the Welfare Department of Henry County, Missouri, until further order of this Court.

No stenographic notes or recordings were requested or made of the hearing of January 2, 1973, but from the transcript of subsequent proceedings filed with this court, it is clear that evidence was presented to support a finding of neglect. In November of 1972, Duane Edwin Trapp, then two months old, was diagnosed as suffering from dehydration. In mid-December, Robert Emery Trapp, then nearly five years old, was ad-

mitted in critical condition to the Clinton hospital with severe dehydration and acute streptococcal pneumonia in both lung fields. In November, the Trapps were living in a four-room house that had no running water and was heated only by a small Coleman cooking stove. The three older children were seen dressed only in undershorts, although the weather was beginning to turn cold. In December, the Trapps moved to a two-room condemned hunting cabin located in an isolated area.

On February 27, 1973, the trial court entered a judgment for $198 per month child support against appellant and her husband, on the finding that both "are gainfully employed" and ordered that this amount be garnished from their wages. A motion for rehearing on the custody order was filed March 16, 1973, and was overruled after a hearing on March 26, 1973. No appeal was taken from these custody and support orders.[1]

On October 28, 1975, the court entered an order returning custody of the appellant's eldest son, Robert Emery Trapp, to her and her husband, and his custody is therefore not involved in this appeal. The record is further complicated by numerous other proceedings wherein respondents and the foster parents caring for the other Trapp children sought to adopt the children. None of those proceedings directly relate to the issues herein.

On December 27, 1975, appellant and her husband filed a motion to set aside the January 2, 1973, custody order and the February 27, 1973, support order, and in the alternative for a hearing to return custody of the children to them. This motion alleged that the custody and support orders were void because of jurisdictional and constitutional defects, and that appellant and her husband were fit and qualified to be given custody of the three children still in foster care.

On May 22, 1978, appellant alone filed a motion to set aside the custody order of January 2, 1973, and to dismiss the neglect petition. This motion did not allege that appellant was fit to have custody of the three children returned to her, but alleged that the juvenile court had no jurisdiction to enter the custody order and that the statutes on which the orders were based (§§ 211.031 and 211.181, RSMo 1978) violated the due process clause of the fourteenth amendment to the United States Constitution. On May 30, 1978, appellant filed a motion challenging the validity of the support order of February 27, 1973, alleging that the support order exceeded the juvenile court's jurisdiction under § 211.241, RSMo 1978 and violated the due process clause of the fourteenth amendment to the United States Constitution. Appellant alleged that the support order was entered without prior notice to the parents and without a hearing into or an express finding of the parents' ability to pay.

On June 7, 1978, respondents filed their third motion to intervene in proceedings on appellant's motion to set aside the 1973 custody and support orders. In the motion to intervene, respondents alleged that they had been caring for Sheryl Ann Trapp as foster parents for several years and that they desired to adopt her. Respondents alleged that they had a direct and substantial interest in the custody proceedings because the court's ruling could prevent them from petitioning for Sheryl Ann's adoption. Appellant opposed the motion to intervene.

On September 14, 1978, appellant gave notice that on September 25, 1978, she would call up for hearing and disposition in the Circuit Court of Henry County six motions then pending in the neglect proceeding:

1. In a related case, *In re Trapp*, 528 S.W.2d 489 (Mo.App.1975), appellant and her husband did appeal a judgment of the Henry County Juvenile Court dated April 29, 1974, which terminated their parental rights to the four children. The court of appeals reversed that judgment on the ground that the evidence adduced in the termination hearing was insufficient to satisfy the statutory requirements for termination of parental rights found in § 211.441, RSMo 1969. The court found that the juvenile authorities had failed to show by clear, cogent and convincing evidence that appellant or her husband had abandoned, wilfully neglected, or wilfully refused to provide support for the children.

(1) Parents' Motion to Set Aside Ex Parte Order Granting Motion to Intervene and Making Intervenors Parties (filed herein on June 15, 1976); (2) Parent's Motion to Dismiss Petition to Intervene Which Petitioners David L. and Judy E. Bridgeman Were Granted Leave to File Herein on February 25, 1977 (filed herein on March 28, 1978); (3) Bridgemans' Motion to Intervene in Matter of Parents' Motion to Set Aside Orders in Child Neglect Proceeding (filed herein on June 7, 1978); (4) Parents' Motion to Set Aside Custody Order of January 2, 1973, and to Set Aside Support Order of February 27, 1973 (filed herein on December 27, 1975); (5) Parent's Motion to Set Aside Custody Order of January 2, 1973 and to Dismiss Neglect Petition (filed herein on May 22, 1978); and (6) Parent's Motion to Set Aside Support Order of February 27, 1973 (filed herein on May 20, 1978).

At the hearing held on September 25, 1978, the court overruled appellant's motions to set aside the custody and support orders, and granted respondents' motion to intervene. Appellant thereafter filed notice of appeal to this court, alleging that the appeal involves construction of the federal or state Constitutions.

[1] The first question here presented is whether or not the orders of September 25, 1978, constituted final judgment for the purposes of appeal. From the record, it is apparent that the trial court did not dispose of the alternative count in appellant's December 27, 1975, motion that requested a hearing into appellant's fitness to regain custody of the children. The transcript of the September 25 hearing indicates that the court offered to proceed with a hearing into the facts and circumstances surrounding appellant's claim of fitness to regain custody of the children and that both parties declined to present evidence on the issue at that time. In this state of the record, the rulings of the court in effect disposed of all issues. We have concluded that in this instance and on these facts there are strong reasons for treating the September 25 orders as final and appealable. The validity of the juvenile court's custody orders has been the subject of litigation for nearly seven years. Seven years is a long time for three young lives to be suspended in such an uncertain status. In order to expedite final resolution of this litigation, we shall treat the judgment and order disposing of the jurisdictional, constitutional and intervention issues in this case as a final judgment for purposes of appeal.[2] Since we have no information about present conditions bearing on the fitness of appellant to have custody of the children awarded to her, we do not rule on the appropriateness of modifying the juvenile court's custody orders. Nothing in this opinion should be

2. *In re Beste*, 515 S.W.2d 530 (Mo.1974) concerned the right of prospective adoptive parents to custody of a child under the supervision of the Division of Family Services. The Court noted that

> [a]ppellant asserts presence of questions involving construction of the Constitution of the United States and of this state. Jurisdiction on that ground is doubtful; however, this case involves the welfare of an infant, and it is retained for decision in the interest of an early resolution of her situation. See Order, Supreme Court, en banc, April 9, 1973; *In Interest of W.H.J., Jr.*, 511 S.W.2d 795 (Mo.1974).

Id. at 531. *In re W.H.J., Jr.*, 511 S.W.2d 795 (Mo.1974) concerned the attempt by natural parents of a child to revoke their consent to its adoption. This Court noted that the natural parents asserted the presence of questions involving the construction of the Constitution of the United States and of this state, and stated

> [j]urisdiction on that ground is, at most, arguable; however, the case involves the welfare of an infant and his relationship to his parents and others, and it is retained for decision in the interest of an early resolution of those interests. See Order, Supreme Court en banc, April 9, 1973.

The instant case, no less than *In re Beste* and *In re W.H.J., Jr.*, involves the welfare of infants and their relationship to their parents and others. This appeal alone has taken over fifteen months to resolve. Dismissal of this case for a hearing into the fitness of the natural parents to regain custody without resolving the jurisdictional, constitutional and intervention issues involved could result in still further delay, if those issues are raised in a subsequent appeal. We retain the case for decision to facilitate early resolution of the interests of the children and parents involved.

taken to limit appellant's right to an evidentiary hearing on the issue of her present fitness to regain custody, pursuant to § 211.251, RSMo 1978 and Rule 121.01.

This appeal presents three questions: (1) did the trial court have jurisdiction under § 211.031, RSMo 1978 to enter the custody order of January 2, 1973, and the support order of February 27, 1973; (2) are the statutory provisions on which the juvenile court's action in entering those orders was based valid on their face and as applied to appellant; and (3) did the trial court err in granting respondents' motion to intervene in the custody proceedings? We will discuss each question *seriatim*.

I.

The grounds on which appellant alleges the trial court acted outside of its jurisdiction when it entered the custody order of January 2, 1973, may be grouped into four categories: insufficiency of the neglect petition; insufficiency of the juvenile court's findings under § 211.181, RSMo 1978; insufficiency of the juvenile court's findings under the federal Constitution; and insufficiency of the evidence to support the custody order. Each of these grounds will be discussed in this section.

The appellant alleges first that the neglect petition was insufficient to vest the juvenile court with jurisdiction to enter custody orders because the neglect petition was couched in the conclusory language of § 211.031.1(1) RSMo 1978 and thus violated the requirement of § 211.091, RSMo 1978 and of the due process clause of the fourteenth amendment to the United States Constitution that a neglect petition state facts.

Appellant's contention that due process requires that a neglect petition state particular facts rests on her analysis of *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). *Gault* reversed the dismissal by Arizona courts of a petition for a writ of habeas corpus filed by the parents of Gerald Gault. Gerald had been adjudged delinquent in proceedings initiated by a petition which "made no reference to any factual basis" for the charge of delinquency. The petition alleged only that "said minor is under the age of eighteen years, and is in need of the protection of this Honorable Court; [and that] said minor is a delinquent minor." *Id.* at 5, 87 S.Ct. at 1432. Neither Gerald nor his parents were served with the petition before the hearing on the merits of the delinquency charges. The court held that notice to the child and to his parents in a delinquency proceeding must comply with due process standards, must afford the child and his parents a reasonable opportunity to prepare a defense to the charges, and "must 'set forth the alleged misconduct with particularity.'" *Id.* at 33, 87 S.Ct. at 1446. The degree of particularity that is due in a custody proceeding where neglect is alleged was not before the court in *Gault*.[2]

[2, 3] The standards for the constitutional adequacy of notice in a neglect proceeding may be found in cases to which *Gault* makes footnote reference. "For application [of the due process requirement of adequate notice] in a civil context, see, *e. g.*, *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)." 387 U.S. at 33 n. 53, 87 S.Ct. at 1447 n. 53. The notice required is that "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Armstrong*, 380

2. The Court expresely limited the scope of its holding to the context of delinquency proceedings:

> We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. . . . We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. 387 U.S. at 13, 87 S.Ct. at 1436. None of the Trapp children have been charged with delinquency, nor have they risked or suffered confinement in a state institution.

U.S. at 550, 85 S.Ct. at 1190; *Mullane*, 339 U.S. at 314, 70 S.Ct. 652. We think the neglect petition in this case satisfies the notice requirements of due process under this test. The petition served on the appellant was adequate to notify her of the pendency of the custody proceeding. The petition made clear that the charges against which the parents would need to defend were those of neglect to provide proper support, of neglect to provide medical or other care necessary for the children's well-being, or of maintaining an environment injurious to the welfare of the children or others.

[4] It is apparent that § 211.091, RSMo 1978 raises more stringent requirements for the contents of a neglect petition than are raised by the notice requirements of constitutional due process.[4] The precise question whether a neglect petition couched in the language of the statute defining the juvenile court's jurisdiction is adequate to vest the court with jurisdiction to enter custody orders, has been addressed in several reported decisions in other states. Such a petition was held adequate in *Ball v. State*, 137 Ga.App. 333, 223 S.E.2d 743, 745 (1976); *Shriner v. Simmons*, 483 S.W.2d 324, 326 (Tex.Ct.App.1972); *In re Three Minor Children*, 110 R.I. 11, 289 A.2d 434, 435 (1972); and *Lennon v. State*, 193 Kan. 685, 396 P.2d 290, 293 (1964). *Contra*, *In re Hunt*, 46 Ohio St.2d 378, 348 N.E.2d 727, 729 (1976); *Matter of Appeal in Pima County, Juvenile Action No. J-46735*, 25 Ariz.App. 424, 544 P.2d 248, 249 (1976). In *In re Three Minor Children* the Child Welfare Services division of the Rhode Island Department of Social Welfare filed petitions in the Family Court alleging that each of three children "is neglected due to lack of proper parental care and guardianship." 289 A.2d at 435. A neglected child is defined by Rhode Island statute as one "who has not the proper parental care or guardianship." R.I.Gen. Laws § 14-1-3(H) (Supp.1978). A provision similar to § 211.091, RSMo 1978 required that "[t]he petition shall state plainly the facts which bring said child within the provisions of this chapter," R.I.Gen. Laws § 14-1-12 (1970). The appellant contended, as the appellant contends in the case before us, that the petitions violated the notice requirements of due process and the statutory requirement that the neglect petition state facts. The Supreme Court of Rhode Island held that the petition satisfied due process notice requirements and that "appellant's contention that each petition alleges only a conclusion is without merit, the conclusion being that the children are neglected and the allegations as to lack of proper parental care and guardianship being allegations of fact in support of that conclusion." 110 R.I. at 13, 289 A.2d at 435. We find that the neglect petition in the instant case stated facts sufficient to vest the juvenile court with jurisdiction to act.

[5] The juvenile court predicated its custody order of January 2, 1973, on the

4. Section 211.091, RSMo 1978 provides:

1. The petition shall be entitled "In the interest of ....., a child under seventeen years of age".

2. The petition shall set forth plainly:

(1) The facts which bring the child within the jurisdiction of the court;

(2) The full name, birth date, and residence of the child;

(3) The names and residence of his parents, if living;

(4) The name and residence of his legal guardian if there be one, of the person having custody of the child or of the nearest known relative if no parent or guardian can be found; and

(5) Any other pertinent data or information.

3. If any facts required in subsection 2 are not known by the petitioner, the petition shall so state.

Rule 114.01, which was not in effect at the time the petition was filed in the instant case, specifies more clearly than does § 211.091, RSMo 1978 that a petition in a juvenile proceeding "shall set forth plainly and concisely, with reasonable particularity . . . . the facts which bring the juvenile within the jurisdiction of the juvenile court, including the date, place and manner of the acts alleged and the law or standard of conduct, if any, allegedly violated by the acts." Rule 114.01(b)(3). We do not reach the question whether a neglect petition couched in the statutory language in violation of Rule 114.01 is so deficient that it would fail to vest the court with jurisdiction to enter custody orders.

finding that "the four children herein are *neglected children within the meaning of the law* and are in need of the care and protection of the State of Missouri." (Emphasis added.) Appellant contends that the custody order is "null and void" because the court did not comply with the requirement of § 211.181, RSMo 1978 that a juvenile court make a finding of fact on which the exercise of its jurisdiction is based. Appellant urges that the court's findings are insufficient to comply with § 211.181, RSMo 1978, relying on *State ex rel. Dew v. Trimble*, 306 Mo. 657, 269 S.W. 617 (banc 1924). *Trimble* does not support appellant's position. In *Trimble*, the juvenile court ordered custody of a child be removed from the child's mother and given to the child's father based on the bare finding that the child "is neglected." The court held that the juvenile court's jurisdiction to enter the custody order could not be presumed and did not appear in the record:

> [t]he juvenile court of Jackson county did not find the existence of any specific condition which would have placed the child, Margaret Marty, within the statutory classification of a "neglected child," nor did it find generally that she was a "neglected child" within the statutory definition thereof. It merely found that "Margaret Marty is neglected."

Id., 269 S.W. at 622. Nevertheless, the court indicated in strong dicta that a finding cast in the form used by the juvenile court in the instant case would be sufficient to insulate the juvenile court's custody orders from attack:

> [I]t is competent for the juvenile court to determine in a given case whether a child is a "neglected child" "within the definition thereof" contained in the statute; it is given express authority so to do; and its finding as to the existence of this jurisdictional fact, when it makes one, is of course conclusive as against collateral attack.

Id. We think the finding that the children involved "are neglected children within the meaning of the law and are in need of . . . care and protection" comports with the jurisdictional basis provided in § 211.031.1(1)(a), RSMo 1978.[4]

[6] Appellant maintains that a juvenile court in a neglect proceeding is required to make findings of fact in entering custody orders by the due process clause of the fourteenth amendment to the United States Constitution, citing *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) and *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1966). We do not find that the findings of the juvenile court in this case failed to satisfy the requirements of due process as established in the cases cited.

[7] Finally, appellant maintains that because there was "total absence" of substantial evidence in the record to support the finding of neglect, the due process clause was violated by the January 2, 1973, custody order, citing *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960); *Cunha v. Brewer*, 511 F.2d 894 (8th Cir. 1975); *Dupree v. Wyrick*, 415 F.Supp. 168 (E.D.Mo. 1976); *Cobb v. Wyrick*, 379 F.Supp. 1287 (W.D.Mo.1974). The cases cited state the settled rule of law that "the sufficiency of the evidence to support a state conviction raises no federal constitutional question." *Cunha*, 511 F.2d at 898. *Accord, Dupree*, 415 F.Supp. at 169; *Cobb*, 379 F.Supp. at 1295. It is only when the record is devoid

4. *In re Interest of J.D.G.*, 498 S.W.2d 786, 788 (Mo.1973), cited by appellant, is not in point. In that case, the Court considered the record finding that a child was "delinquent by statutory rape within the provision of the Juvenile Code." The Court held that the record "contains no finding of fact under § 211.031(1)(c), RSMo 1978 [that the behavior, environment or associations of the child are injurious to his welfare or to the welfare of others]," but that the record "does contain the requisite finding of fact under § 211.031(1)(d) [that the child is alleged to have violated a state law, now § 211.031.1(2)]." The case does not require that a juvenile court refer to the specific subsection of the jurisdictional statute, nor is it authority for holding that the juvenile court in this case failed to find facts on which its exercise of jurisdiction is based under §§ 211.031.1(1)(a) and 211.181, RSMo 1978.

of any evidence to support a finding of a criminal defendant's guilt of the crime charged that his conviction and punishment may constitute a deprivation of federal due process. *Garner*, 368 U.S. at 170, 82 S.Ct. 248; *Thompson*, 362 U.S. at 204, 206, 80 S.Ct. 624. The juvenile court in this case stated that Bill Edmonds, a child welfare aide, and Dr. Coleberd, a physician, were present at the January 2, 1973, hearing, and "evidence [was] heard on the petition herein." Appellant admits that Coleberd was "the Trapps' family physician" who had examined all four children in December 1972 and that the welfare aide had visited the Trapp home in November and December of 1972. Although no recording or transcript was made of the hearing, the failure to make a transcript was in conformity with § 211.171.4, RSMo 1978.[6] We cannot conclude from this record that the court's finding of neglect was totally without evidentiary support.

[8] Our conclusion that the trial court acted within its jurisdiction when it entered the custody order of January 2, 1973, does not dispose of appellant's contention that the support order entered on February 27, 1973, was invalid. Appellant contends that the support order violates the requirements of § 211.241.2, RSMo 1978[7] and constitutional due process, because "said support order was entered without any prior proceeding in court with regard thereto, without any prior notice thereof to said parents, and without any finding that said parents were able to pay." The record refutes appellant's allegations of irregularity as to this appellant. Appellant was summoned to appear, and did appear in the custody hearing of January 2, 1973. Section 211.241.1, RSMo 1978 authorizes a juvenile court to inquire into the parents' ability to make support payments either in the initial custody proceedings or in subsequent proceedings. After the custody hearing and without further hearing, the juvenile court entered the finding that appellant and her husband "are gainfully employed,"[8] and ordered them to pay $198 per month in support and to assume responsibility for the medical care of the children. Thus, the record shows that appellant was given notice and an opportunity to be heard on the issue of support of the children, and that she was found able to provide such support. We find no ground for holding the support order entered February 27, 1973, invalid as to this appellant.[9]

6. Section 211.171.4, RSMo 1978 provides that "[s]tenographic notes or an authorized recording of the hearing shall be required if the court so orders or if requested by any party interested in the proceeding." No such order or request was made in this case. It should be noted that Rule 117.03, effective August 1, 1976, requires that the juvenile court keep a "complete record of all testimony" in proceedings before it.

7. Section 211.241, RSMo 1978 provides in part:
1. When the juvenile court finds a child to be within the purview of applicable provisions of section 211.031 it may in the same or subsequent proceedings, either on its own motion or upon the application of any person, institution or agency having the custody of such child, proceed to inquire into the ability of the parent of the child to support it or to contribute to its support. If the parent does not voluntarily appear for the proceeding, he shall be summoned in the same manner as in civil cases and the summons in the case may issue to any county of the state.
2. If the court finds that the parent is able to support the child or to contribute to its support, the court may enter an order requiring the parent to support the child or to contribute to its support and to pay the costs of collecting the judgment.

8. Appellant refers to the statement in *In re Trapp*, 528 S.W.2d 489, 492 (Mo.App.1975) that the Trapps "both were unemployed at the time of the hearing on the neglect petition January 2, 1973," and were not both employed until sometime in February 1973. This statement, based on ambiguous testimony given in the subsequent termination proceedings, is insufficient to show that the juvenile court had no evidence to support a finding of ability to pay in the initial custody hearing, especially in the light of the fact that "Mr. Trapp deliberately avoided giving information about his employment to avoid garnishment." *Id.* at 493.

9. The wages of the appellant and her husband, Robert, were ordered garnished in execution of the support order. Neither appellant nor her husband appealed from the entry of the support and garnishment orders. It appears from this record that Robert Trapp did not receive notice of the hearing that resulted in the entry of support orders against him. Robert Trapp is

II.

We turn now to examine appellant's contention that §§ 211.031 and 211.181, RSMo 1978, on which the January 2, 1973, custody orders were based, are unconstitutional both on their face and as applied to appellant. Appellant marshalls a variety of complex arguments to the effect that the statutes violate her rights under the due process clause of the fourteenth amendment to the United States Constitution. In brief summary, appellant contends that (a) the statutes are impermissibly vague and overbroad and fail to give parents fair warning of what conduct is proscribed; (b) the statutes do not require the state to show that more harm is likely to result to a child from permitting the parents to retain the child's custody than from state intervention; and (c) the statutes do not require the state to prove alleged neglect by "clear and convincing evidence." Appellant relies primarily on *Alsager v. District Court of Polk County*, 406 F.Supp. 10 (S.D.Ia.1975), *aff'd*, 545 F.2d 1127 (8th Cir. 1976) and *Roe v. Conn*, 417 F.Supp. 769 (M.D.Ala.1976). We do not read the cases cited by appellant to require as a matter of due process that neglect statutes embody the standards of harm and of proof urged by appellant.[10] The argument that § 211.031, RSMo 1978 is unconstitutional as applied to appellant is treated in section I of this opinion, *supra*. We will consider in greater detail the claim that the statutes are unconstitutionally vague and overbroad on their face.

[9-11] In considering this attack on the constitutionality of duly enacted legislation, we are guided by several well-established principles. A statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly and undoubtedly violates some constitutional provision. *Americans United v. Rogers*, 538 S.W.2d 711, 716 (Mo. banc 1976), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976); *State ex rel. McClellan v. Godfrey*, 519 S.W.2d 4, 8-9 (Mo. banc 1975); *State v. Crawford*, 478 S.W.2d 314, 316 (Mo.1972), *appeal dismissed*, 409 U.S. 811, 93 S.Ct. 176, 34 L.Ed.2d 66, *rehearing denied*, 409 U.S. 1051, 93 S.Ct. 536, 34 L.Ed.2d 505 (1972); *Hickey v. Board of Education of City of St. Louis*, 363 Mo. 1039, 256 S.W.2d 775, 778 (1953). A statute violates the due process clause of the fourteenth amendment when it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *State ex rel. Eagleton v. McQueen*, 378 S.W.2d 449, 453 (Mo. banc 1964). Impossible standards of specificity are not required. Even in the case of a statute that defines a criminal offense, due process requires no more than that the statute convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Petrillo*, 332 U.S. 1, 8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877 (1947); *State v. Smith*, 431 S.W.2d 74, 78 (Mo.1968).

The fact that the state has a legitimate interest in the custody of neglected children cannot be denied. In *Stanley v. Illinois*, 405 U.S. 645, 649, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972), the United States Supreme Court acknowledged the existence of "[t]he State's right—indeed, duty—to protect minor children through a judicial determination of their interests in a neglect proceed-

not a party to this proceeding, however, and appellant is without standing to assert his rights with respect to the support order entered against him. Consequently, we do not reach the question whether the support order is vulnerable to collateral attack on due process grounds by Robert Trapp for failure of notice, or whether successful invalidation of the support judgment entered against Robert Trapp might render the judgment unenforceable as against this appellant.

10. Both cases are distinguishable from the present case, as they involved the requirements of due process in the context of proceedings to terminate the parent-child relationship. Neither case purported to state the precise requirements of due process in a custody proceeding based on allegations of neglect. Moreover, neither case involved a record of life-threatening illness and inadequate provision of clothing and shelter such as that presented in this case.

ing." Constitutional challenges for vagueness or overbreadth mounted against statutory neglect standards similar to those in § 211.031, RSMo 1978 have been rejected in other jurisdictions. *In re Interest of Metteer*, 203 Neb. 515, 279 N.W.2d 374, 378 (1979); *Matter of D.T.*, 89 S.D. 590, 237 N.W.2d 166, 169 (1975); *People v. Schoos*, 15 Ill.App.3d 964, 305 N.E.2d 560, 562 (1973); *In re Neglected Child*, 130 Vt. 525, 296 A.2d 250, 254 (1972). The courts in these jurisdictions consider the vagueness question in the light of the purposes which the neglect provisions are designed to accomplish. *Metteer*, 203 Neb. at 518, 279 N.W.2d at 377; *Matter of D.T.*, 237 N.W.2d at 169. The stated purpose of Missouri's Juvenile Courts Chapter "is to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court." § 211.011, RSMo 1978. "[T]he many diverse circumstances which give rise to a finding of neglect must be considered when the standards embodied in [the statute] are viewed in the light of the due process clause." *Neglected Child*, 130 Vt. at 531, 296 A.2d at 254. "Child neglect is by its very nature incapable of a precise and detailed definition." *Schoos*, 15 Ill. App.3d at 967, 305 N.E.2d at 562.

A challenge to the constitutionality of §§ 211.031 and 211.181, RSMo 1978 similar to that made here was rejected in *Minor Children of F. B. v. Caruthers*, 323 S.W.2d 397 (Mo.App.1959). In *Caruthers*, the court concluded:

> Courts are always reluctant to strike down legislative enactments and when it is asserted that the statute is so indefinite as to result in a denial of due process, we must consider it in the light of the problem with which the legislature was attempting to deal. . . . The statute deals with children in need of care that they are not receiving and this may arise in so many ways that it would be impossible to state them all with great exactitude. The words used have acquired an accepted legal meaning and are therefore not vague and indefinite.
>
> . . . . . .
>
> It is our conclusion that the section is not unconstitutional, for it is in effect but a restatement of a jurisdiction long existing in equity. Its application and purpose are known and it is not therefore vague or uncertain and consequently not violative of the due process accorded by the constitution of the State or Federal Government.

Id. at 401.

[12] The specific language considered in *Caruthers* was that of § 211.031.1(1)(b), RSMo 1978. Appellant in this case focuses her attack against § 211.031.1(1)(a) and 211.031.1(1)(c), RSMo 1978. We do not find the neglect standards embodied in § 211.031.1(1)—"proper support, education which is required by law, medical, surgical or other care necessary for [the child's] well-being," "otherwise without proper care, custody or support," and "behavior, environment or associations . . . injurious to [the child's] welfare or to the welfare of others"—to be so indefinite or susceptible of multifarious interpretation that ordinary persons "must necessarily guess at" their meaning. The neglect standards are sufficiently clear and definite to inform and warn a parent of common intelligence of the level of child care which the state requires and expects.

> The argument of the appellant, carried to its logical extreme, would require that in order for a statute to meet constitutional standards it must contain a precise checklist of parental responsibilities as well as a list of prohibitions. Society does not operate in a historical, social, or moral vacuum. The terms used in the statute, while broad must be interpreted in the light of our history, culture, generally accepted standards of morality, and the common understanding of the behavior of reasonably conscientious and well-intentioned parents.

Metteer, 203 Neb. at 520, 279 N.W.2d at 377–78. Appellant's contention that the standards for neglect in § 211.031, RSMo 1978 are unconstitutionally vague and overbroad is without merit and is denied in all respects.

III.

[13] Appellant contends that the trial court erred in permitting respondents to intervene in this custody proceeding. Respondents are licensed foster parents who presently have physical custody of Sheryl Ann, one of the children whose custody was the subject of the orders under attack. Respondents allege that they desire to adopt the child, and that

> the Court's ruling herein could have the possible effect of terminating their right to Petition for adoption of said child and to merely maintain said child in their home as a foster child. Intervenors are so situated that disposition of this action may as a practical matter impair or impede their ability to protect their interests and their interests will not be adequately represented by the existing parties.

Intervention is granted as a matter of right upon timely application provided the applicant

> claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 52.12(a)(2); § 507.090.1, RSMo 1978. We find that respondents do not have the requisite "interest relating to" the subject of this action to intervene in the proceeding.

[14] The type of interest that is contemplated under Rule 52.12 was analyzed in *State ex rel. Farmers Mutuals Automobile Ins. Co. v. Weber*, 364 Mo. 1159, 273 S.W.2d 318 (banc 1954).

> "Interest," generally, means a concern which is more than mere curiosity, or academic or sentimental desire. One interested in an action is one who is interested in the outcome or result thereof because he has a legal right which will be directly affected thereby or a legal liability which will be directly enlarged or diminished by the judgment or decree in such action.
>
> As used in the above quoted portion of Section 507.090, and in intervention statutes generally, "interest" means a direct and immediate claim to, and having its origin in, the demand made or proceeds sought or prayed by one of the parties to the original action, but such "interest" does not include a mere consequential, remote or conjectural possibility of being in some manner affected by the result of the original action; to come within the above statute, the "interest" must be such an immediate and direct claim upon the very subject matter of the action that intervener [sic] will either gain or lose by the *direct operation* of the judgment that may be rendered therein.

Id. 273 S.W.2d at 321 (emphasis in original).

Although Rule 52.12(a) was changed in 1972 to "facilitate the determination of all related disputes in one proceeding, and thereby avoid a multiplicity of actions," *State, etc., v. City of St Joseph*, 579 S.W.2d 804, 806 (Mo.App.1979); *State ex rel. Hughes v. Smith*, 485 S.W.2d 646, 651 (Mo.App.1972), the change in the rule did not dispense with the requirement that the applicant have an interest in the subject of the litigation. *State, etc., v. City of St. Joseph*, 579 S.W.2d at 806-07.

The subject matter of the neglect proceeding in this case is the current fitness of appellant to regain custody of her children. Respondents' alleged interest in the custody of Sheryl Ann does not meet the requirements articulated in *Weber*. Respondents' allegation that the court's ruling could frustrate their desire to adopt Sheryl Ann is not "an immediate and direct claim upon the very subject matter" of the pending neglect proceeding. Respondents have no right to appeal the judgment in the proceeding. § 211.261, RSMo 1978; *In re Baby Girl B.*____, 545 S.W.2d 696, 697 (Mo.App.1976). Respondents will not gain or lose by the direct operation of a judgment in the pending proceedings, and they have no legal right which will be directly enlarged or diminished by the judgment of the juvenile court. The legal right to custody is in the

Division of Family Services; the foster parents retain physical custody as agents of the Division of Family Services. The cost of foster care for neglected children whose legal custody is vested in the Division of Family Services is required by statute to be paid by the Division. § 207.020(17), RSMo 1978. Any claim respondents may have to physical custody of Sheryl Ann does not have its origin in the petition for removal of custody of the child from the natural parents on allegations of neglect. For these reasons, we have concluded that respondents have no right to intervene in the pending custody proceeding.

[15] Respondents contend that § 452.485, V.A.M.S.Supp.1979, confers on them an unconditional right to intervene in this proceeding. Section 452.485, V.A.M.S.Supp. 1979, provides that when a court in a child custody proceeding learns "that a person not a party to the custody proceeding has physical custody of the child . . . it *may* order that person to be joined as a party."[11] (Emphasis added.) The term "custody proceeding" is defined for this purpose at § 452.445(2), RSMo 1978, to include an action for child neglect or abandonment in which custody is an issue. We think that § 452.485, V.A.M.S.Supp.1979, does not confer a right on foster parents having physical custody of a child to intervene in a custody proceeding based on allegations of neglect or abandonment of the child by the natural parents. The provision is designed to confer certain powers on the circuit court, but it does not confer a right to litigate the issue of neglect on persons who are not interested under the terms of the Juvenile Courts Chapter, Chapter 211, RSMo 1978. The rights of foster parents are the same under § 452.485, V.A.M.S. Supp.1979, as they were before its enactment.

Sections 452.445 to 452.550, RSMo 1978, are adopted from the Uniform Child Custody Jurisdiction Act (UCCJA). In at least one other state that has adopted the UCCJA provisions cited, it has been held that foster parents have no standing to intervene as parties in a neglect hearing. *Welfare of E. G.*, Minn., 268 N.W.2d 420 (1978). *See* Minn.Stat.Ann. §§ 518A.02(c), 518A.10 (Supp.1979). In *In re E. G.*, the natural mother sought to regain custody of two minor children who had been adjudicated neglected in 1968. Foster parents had cared for one of the children continuously since it was 45 days old, a period of nearly 10 years, and moved to intervene in the proceedings. The juvenile court entered an order permitting the foster parents to intervene, and the natural mother sought a writ of prohibition to prevent the order from taking effect. The Minnesota Supreme Court held that foster parents had no standing to intervene in the proceedings, and granted the writ of prohibition. The court recognized that strong psychological bonds naturally should have developed between the foster parents and the child, and that the foster parents could offer material evidence concerning the spiritual, emotional, mental and physical well-being of the child. Nevertheless, the court held that the Minnesota Juvenile Courts Act "does not contemplate, however, that hearings concerning a neglected child be conducted in an adversary atmosphere." 268 N.W.2d at 422. *See State, by St. Louis County Welfare Department v. Niemi*, 284 Minn. 225, 230, 169 N.W.2d 758, 761 (1969).

There are sound policy reasons for rejecting respondents attempt to intervene in this proceeding. The presence of the foster parents in this action would tend to interject the false issue of the fitness of the foster parents to have custody of the children. The sole issue before the juvenile court in this proceeding is the present fitness of the parents to have custody of their children returned to them. Chapter 211, RSMo

11. Although the court's September 25, 1978, order permitting respondents to intervene preceded the effective date (March 6, 1979) of this statute, the same provision, identical except for the omission of the italicized word "may," was enacted by the legislature the previous year, effective August 13, 1978. Laws of Mo.1978, p. 693; § 452.485, RSMo 1978. The omission of the word "may" was apparently an oversight, and its subsequent insertion is strong evidence of the legislative intent in passing § 452.485, RSMo 1978.

1978, authorizes removal of custody from parents only when one or more of the statutory conditions is satisfied. The General Assembly has not authorized the removal of children from the custody of their parents on the ground that the children would be "better off" in another home. *See S. K. L. v. Smith*, 480 S.W.2d 119, 125 (Mo.App. 1972).

IV.

[16] Having ruled on all the issues raised by this appeal, we address one further matter. In the case of *In re Trapp, supra* n. 1, the Missouri Court of Appeals, Western District, reversed an order terminating the parental rights of this appellant. Following that decision, the Juvenile Officer filed another termination petition on April 29, 1979. Upon Judge Kyser's refusal to sustain this appellant's application for change of Judge, the Missouri Court of Appeals, Western District, sustained this appellant's right to have a change of judge, and prohibited Judge Kyser from further proceedings on the termination petition. *State ex rel. Brault v. Kyser*, 562 S.W.2d 172 (Mo.App.1978). While the Court there held the petition for termination of parental rights was a separate action for the purpose of determining the right to a second change of judge, that action involved the same parties and the same children as this action.

In the exercise of our general supervisory power over the circuit court, Mo.Const. art. 5 § 4, and in order to avoid any appearance of impropriety, Cannon 2 of the Code of Judicial Conduct, Supreme Court Rule 2, we therefore order Judge Kyser to enter an order disqualifying himself from presiding over further proceedings concerning the custody of these children and upon entry of said order that he request this Court to make assignment of a judge in this matter, and in the unresolved and pending termination matter in the event such assignment has not already been requested. We further order that proceedings concerning termination of the parental rights of the natural parents to the children here involved by stayed pending disposition of the motion to restore custody to the natural parents.

The order of the trial court of September 25, 1978, granting respondents' motion to intervene in the pending custody proceedings will be reversed. The order overruling appellant's motions to set aside the 1973 custody and support orders will be affirmed.

DONNELLY, RENDLEN and MORGAN, JJ., concur.

BARDGETT, C. J., concurs in part and dissents in part in separate opinion filed.

SEILER, J., concurs in part and dissents in part in separate opinion filed.

HIGGINS, J., dissents in separate dissenting opinion filed.

BARDGETT, Chief Justice, concurring in part and dissenting in part.

I concur in the dissenting opinion of Higgins, J., which holds that there is not a final and appealable judgment in this case and agree that the appeal should be dismissed. Nevertheless, and in view of the fact that the majority of the Court has concluded that there is an appealable order in this case, I file this opinion in order to address other issues discussed in the principal opinion.

In my opinion, the record on appeal in this case clearly demonstrates that the support order entered February 27, 1973, was entered at a time when Mr. Trapp was not a party to the proceedings and had not been served with any process, received any notification, and was not personally present. In these circumstances, I believe that the support order was wholly void as to Mr. Trapp. Likewise, it is my opinion that the order is void as to Mrs. Trapp. She had been served with the original petition alleging neglect and appeared personally at the January 2d hearing. She was indigent so the court appointed an attorney for her that day and a hearing was held, but no stenographic notes were made of it. The court order found the children to be neglected and they were made wards of the court

with their care and custody placed in the Welfare Department of Henry County. There is no indication in the petition or in the order that any hearing with reference to monetary support orders or ability to pay was held or would be held. The order makes no reference to that matter at all. On February 27, 1973, the record shows a judgment was entered as follows: "Judgment entered against Robert Emory Trapp and Linda Mae Trapp for $198.00 per month child support commencing March 5, 1973. Sheriff to serve parents with a copy of said Order."

On March 5, 1973, the record contains the following entry:

"*Sheryl Ann Trapp, b.d. 4-25-69; Dee Ann Elaine Trapp, b.d. 4-7-70 and Duane Edwin Trapp, b.d. 9-8-72,* all of whom are wards of the court and care and custody of Division of Welfare; the court finds that said children are deprived of proper financial support while in foster care due to the falsification of information on the part of the natural parents of said children.

"Now on this 27th day of February, 1973, the Henry County Juvenile Court hereby orders that Mr. and Mrs. Robert Emory Trapp who are gainfully employed, be made responsible for the financial support of said children in the amount of $198.00 per month or $66.00 per child. Court further orders that this amount be garnisheed from the wages of the parents through the Henry County Circuit Clerk. The court further orders that the natural parents assume responsibility of medical care of said children. This will be in judgment of the court until further order."

"On March 5, 1973, the following record entry appears: 'Summons with Order attached issued to parents and delivered to sheriff of Henry County for service.'

"On March 14, 1973, the following record entry appears: 'Return on service of summons to Robert Emory Trapp and Linda Mae Trapp filed by Sheriff of Henry County.'"

As noted supra, the order of January 2, 1979, which resulted from that hearing contained no support orders, nor is there any indication that there was any evidence with reference to financial ability or any other matter pertaining to failure to support or ability to support heard by the court. There was no further hearing and there was no further notice of any impending hearing or any impending support order served upon Mrs. Trapp on the record before us. The court simply entered up an order on February 27 which it denominated a judgment for $198.00 per month child support against appellant Mrs. Trapp and her husband, Mr. Trapp. Assuming the order of September 25, 1978, overruling appellant's motion to set aside the support order of February 27, 1973, is appealable, it is my opinion, on the record before us, that the order is void because: (1) Mr. Trapp was not a party and received no notice of the proceedings; Mrs. Trapp received no notice of any impending hearing with reference to a money judgment in the form of a support order; (3) the record reflects there was no hearing at all with reference to this matter; and (4) if the order is invalid as to Mr. Trapp then, since it is obviously based upon the combined income of Mr. and Mrs. Trapp, it must of necessity be invalid as to Mrs. Trapp. I do not agree with footnote 8 of the principal opinion that the statement appearing in *In re Trapp*, 528 S.W.2d 489, 492 (Mo.App.1975), was based upon ambiguous testimony or is insufficient to show that the juvenile court had no evidence to support a finding of ability to pay in the initial custody hearing. The record in this case demonstrates a complete lack of evidence to support a finding of ability to pay in either the initial custody hearing or at any other time prior to the entry of the support order. In short, the record shows money judgments entered up against appellant and her husband without due process of law being afforded either of them.

I concur in the holding that §§ 211.031 and 211.181, RSMo 1978, are constitutional on their face and as applied to the appellant. In my opinion, the petition originally filed in this case was general in its allega-

tions. Respondent could have moved to require it to be made more definite and certain with respect to particular charges of neglect but failed to do so.

I concur in parts III and IV of the particular opinion.

SEILER, Judge, concurring in part and dissenting in part.

I concur, except as to the validity of the support order of February 27, 1973, as to which I dissent for the reasons stated by Bardgett, C. J. in his separate opinion.

HIGGINS, Judge, dissenting.

I agree with the discussion which accords constitutionality to these proceedings and §§ 211.031 and 211.191, RSMo, and denies intervention. I do not agree with the discussion validating the support order for the reasons expressed in the dissent of Bardgett, C. J. I dissent from the majority because I do not believe its discussion of any of the issues can be delivered as an opinion of this Court absent jurisdiction upon which to do so.

Premature consideration of the subject matter of this case is premised on the time these children have been within the jurisdiction of the juvenile court. This is not required because the juvenile court with its flexible powers is better equipped to deal with their problems than the courts which deal with fixed rights and permanent status. *In re J.*____, 357 S.W.2d 197 (Mo.App. 1962). The public policy of this state is that when jurisdiction over the person of a child has been acquired by the juvenile court for care and treatment because of parental neglect, jurisdiction may be retained, if necessary to his well-being, until the child has attained the age of twenty-one years. §§ 211.031 and 211.041, RSMo. Limitation on the exercise of parental rights in this case may comport favorably with achievement of the ultimate and most desirable goal of reinstating the natural and normal parent and child relationship. § 211.011, RSMo; *State v. Couch*, 294 S.W.2d 636 (Mo. App.1956).

The majority opinion demonstrates the absence of a final and appealable judgment in this case.[1] Accordingly, this appeal is premature and should be dismissed and the cause remain open for such other and further proceedings in the juvenile court as could be indicated by order of this Court or otherwise. Rules 81.01 and 120.01; §§ 211.-261 and 512.020, RSMo; *Kansas City Power & Light Company v. Kansas City*, 426 S.W.2d 105 (Mo.1968).

William Scott SOURS, Appellant,

v.

STATE of Missouri, Respondent.

No. 61458.

Supreme Court of Missouri,
En Banc.

Jan. 15, 1980.

Rehearing Denied Feb. 11, 1980.

Defendant moved to set aside convictions based on guilty pleas to information in two counts charging robbery first degree by means of dangerous and deadly weapon and armed criminal action. The Circuit Court, Jasper County, Ben F. Pyle, J., denied motion, and defendant appealed. The Supreme Court, Welliver, J., held that armed criminal action and underlying felony, in this case robbery first degree, were the

1. *In re Beste*, 515 S.W.2d 530 (Mo.1974) and *In re W. H. J., Jr.*, 511 S.W.2d 795 (Mo.1974), cited in the majority opinion as support for taking jurisdiction in this case do not lack final and appealable orders. They do not stand for creation of jurisdiction where none exists. They stand for retention of jurisdictional in the Supreme Court where presence of a final appealable order vests jurisdiction in the Court of Appeals or the Supreme Court as the case may be.

APPENDIX B

(Judgment of Supreme Court of Missouri)

Mailed:
FEB 26 1980

No. 61076

Circuit Court No. J-887

In the Supreme Court of Missouri

January Session, 1980

In the Matter of:

Sheryl Ann Trapp, Dee Ann Trapp, and Duane Edwin Trapp.

Robert Emery Trapp, Father and Linda Mae Trapp, Mother and Appellant,

David L. and Judy E. Bridgeman, Intervenors-Respondents.

Appeal from the Circuit Court of Henry County

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, by the Circuit Court of Henry County rendered, shall be affirmed in part, and in part, reversed, annulled and for naught held and esteemed, and that the said cause be remanded to the said Circuit Court of Henry County for further proceedings to be had therein, in conformity with the opinion of this Court herein delivered.

(Opinion filed.)

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January *Session thereof, 1980, and on the* 15th *day of* January *1980, in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson, this 15th *day of* January *1980*

Thomas F. Simon *Clerk.*

Mary Elizabeth McHaney *D. C.*

APPENDIX C

(Order on Motion for Rehearing)

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIM
CLERK

TELEPHONE
(314) 751-4144

February 11, 1980

Mr. James L. Muller
Legal Aid of Western Missouri
3rd Floor, 1103 Grand Avenue
Kansas City, Missouri 64106

In re: In the Matter of Sheryl Ann Trapp, et al.
No. 61076

Dear Mr. Muller:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

Thomas F. Sim

Clerk.

cc: Mr. William L. Curry
Mr. William J. Cason

APPENDIX D

(Notice of Appeal)

IN THE SUPREME COURT OF MISSOURI

EN BANC

DUPLICATE OF FILING ON
FEB 26 1980
IN OFFICE OF CLERK SUPREME COURT

In the Matter of:	)	
	)	
SHERYL ANN TRAPP, DEE ANN TRAPP, and DUANE EDWIN TRAPP.	)	No. 61076
	)	
ROBERT EMERY TRAPP, Father, LINDA MAE TRAPP, Mother and Appellant.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the above-named appellant, Linda Mae Trapp, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Court of Missouri affirming the judgment of the Juvenile Court below overruling appellant's motions to set aside the custody order of January 2, 1973, and the support order of February 27, 1973, which Supreme Court judgment was entered in this action on January 15, 1980, and was rendered final by the Court's order of February 11, 1980, overruling appellant's timely motion for a rehearing herein.

This appeal is taken pursuant to 28 U.S.C.A. §1257(2).

James L. Muller

JAMES L. MULLER
Legal Aid of Western Missouri
330 Professional Building
1103 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6750
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Notice of Appeal upon the Respondent by mailing a copy thereof, postage prepaid, to Mr. William L. Curry, Juvenile Officer, Henry County Courthouse, Clinton, Missouri 64735, on the 22d day of February, 1980; and I further certify that all parties required to be served have been served.

James L. Muller

Attorney for Appellant

APPENDIX E

(Statutory Provisions Involved)

Chapter 211

JUVENILE COURTS

211.011. Purpose of law—how construed.—1. The purpose of this chapter is to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them.

(L. 1957 p. 642 § 211.010)

211.031. Jurisdiction of juvenile court over children who are neglected or charged with crime

Except as otherwise provided herein, the juvenile court shall have exclusive original jurisdiction in proceedings:

(1) Involving any child who may be within the county who is alleged to be in need of care and treatment because:

(a) The parents or other persons legally responsible for the care and support of the child neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his well-being; except that reliance by a parent, guardian or custodian upon remedial treatment other than medical or surgical treatment for a child shall not be construed as neglect when the treatment is recognized or permitted under the laws of this state; or

(b) The child is otherwise without proper care, custody or support; or

(c) The behavior, environment or associations of the child are injurious to his welfare or to the welfare of others; or

(d) The child is alleged to have violated a state law or municipal ordinance;

(2) Concerning any minor seventeen years of age or older who may be within the county, and who is alleged to have violated a state law or municipal ordinance prior to having become seventeen years of age;

(3) For the suspension or revocation of a state or local license or authority of a child to operate a motor vehicle;

(4) For the adoption of a person;

(5) For the commitment of a child to the guardianship of the department of public health and welfare as provided by law. (L.1957 p. 642 § 1 [§ 211.030])

211.041. Continuing jurisdiction over child

When jurisdiction over the person of a child has been acquired by the juvenile court under the provisions of this chapter in proceedings coming within the applicable provisions of section 211.031, the jurisdiction of the child may be retained for the purpose of this chapter until he has attained the age of twenty-one years, except in cases where he is committed to and received by the state board of training schools, unless jurisdiction has been returned to the committing court by provisions of section 219.220, RSMo, through requests of the court to the board of training schools.
Amended by Laws 1969, p. 352, § 1.

211.091. Petition in juvenile court—contents

1. The petition shall be entitled "In the interest of ....., a child under seventeen years of age".

2. The petition shall set forth plainly:

(1) The facts which bring the child within the jurisdiction of the court;

(2) The full name, birth date, and residence of the child;

(3) The names and residence of his parents, if living;

(4) The name and residence of his legal guardian if there be one, of the person having custody of the child or of the nearest known relative if no parent or guardian can be found; and

(5) Any other pertinent data or information.

3. If any facts required in subsection 2 are not known by the petitioner, the petition shall so state. (L.1957 p. 642 § 1 [§ 211.090])

211.101. Issuance of summons—notice—temporary custody of child—subpoenas

1. After a petition has been filed, unless the parties appear voluntarily, the juvenile court shall issue a summons in the name of the state of Missouri requiring the person who has custody of the child to appear personally and, unless the court orders otherwise, to bring the child before the court, at the time and place stated.

2. If the person so summoned is other than a parent or guardian of the child, then the parent or guardian or both shall also be notified of the pendency of the case and of the time and place appointed.

3. If it appears that the child is in such condition or surroundings that his welfare requires that his custody be immediately assumed by the court, the judge may order, by endorsement upon the summons, the officer serving it to take the child into custody at once.

4. Subpoena may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary. (L.1957 p. 642 § 1 [§ 211.100])

211.171. Hearing procedure

1. The procedure to be followed at the hearing shall be determined by the juvenile court judge and may be as formal or informal as he considers desirable. He may take testimony and inquire into the habits, surroundings, conditions and tendencies of the child to enable the court to render such order or judgment as will best promote the welfare of the child and carry out the objectives of sections 211.011 to 211.431.

2. The hearing may, in the discretion of the court, proceed in the absence of the child and may be adjourned from time to time.

3. All cases of children shall be heard separately from the trial of cases against adults.

4. Stenographic notes or an authorized recording of the hearing shall be required if the court so orders or if requested by any party interested in the proceeding.

5. The general public shall be excluded and only such persons admitted as have a direct interest in the case or in the work of the court.

6. The practice and procedure customary in proceedings in equity shall govern all proceedings in the juvenile court. (L.1957 p. 642 § 1 [§ 211.190])

211.181. Order for disposition or treatment of child within jurisdiction

When a child is found by the court to come within the applicable provisions of section 211.031, the court shall so decree and make a finding of fact upon which it exercises its jurisdiction over the child and the court may, by order duly entered, proceed as follows:

(1) Place the child under supervision in his own home or in custody of a relative or other suitable person upon such conditions as the court may require;

(2) Commit the child to the custody of:

(a) A public agency or institution authorized by law to care for children or to place them in family homes;

(b) Any other institution or agency which is authorized or licensed by law to care for children or to place them in family homes;

(c) An association, school or institution willing to receive it in another state if the approval of the agency in that state which administers the laws relating to importation of children into the state has been secured;

(d) The juvenile officer; or

(3) Place the child in a family home;

(4) Cause the child to be examined and treated by a physician, psychiatrist or psychologist and when the health or condition of the child requires it, cause the child to be placed in a public or private hospital, clinic or institution for treatment and care, except that nothing contained herein authorizes any form of compulsory medical, surgical, or psychiatric treatment of a child whose parents or guardian in good faith are providing other remedial treatment recognized or permitted under the laws of this state.

(5) Suspend or revoke a state or local license or authority of a child to operate a motor vehicle. (L.1957 p. 642 § 1 [§ 211.200])

211.241. Court orders to parents for support of children, procedure—county to support, when

1. When the juvenile court finds a child to be within the purview of applicable provisions of section 211.031 it may in the same or subsequent proceedings, either on its own motion or upon the application of any person, institution or agency having the custody of such child, proceed to inquire into the ability of the parent of the child to support it or to contribute to its support. If the parent does not voluntarily appear for the proceeding, he shall be summoned in the same manner as in civil cases and the summons in the case may issue to any county of the state.

2. If the court finds that the parent is able to support the child or to contribute to its support, the court may enter an order requiring the parent to support the child or to contribute to its support and to pay the costs of collecting the judgment.

3. The court may enforce the order by execution and the execution may issue on request of the juvenile officer or any person, agency or institution which has been awarded custody of the child. No deposit or bond for costs shall be required as a condition for the issuance or service of the execution. No property is exempt from execution upon a judgment or decree made under this section, and all wages or other sums due the parent is subject to garnishment or execution in any proceedings under this section.

4. Otherwise the necessary support of the child shall, unless the court commits the child to a person or institution willing to receive it without charge, be paid out of the funds of the county but only upon approval of the judge of the juvenile court. (L. 1957 p. 642 § 1 [§ 211.240]).

211.251. Modification of court orders

1. A decree of the juvenile court made under the provisions of section 211.181 may be modified at any time on the court's own motion.

2. The parent, guardian, legal custodian, spouse, relative or next friend of a child committed to the custody of an institution or agency may, at any time, petition the court for a modification of the order of custody. The court may deny the petition without hearing or may, in its discretion, conduct a hearing upon the issues raised and may make any orders relative to the issues as it deems proper.

3. The authority of the juvenile court to modify a decree is subject to the provisions of chapter 219, RSMo. (L.1957 p. 642 § 1 [§ 211.250])

211.261. Appeals

An appeal shall be allowed to the child from any final judgment, order or decree made under the provisions of sections 211.011 to 211.431 and may be taken on the part of the child by its parent, guardian, legal custodian, spouse, relative or next friend. An appeal shall be allowed to a parent from any final judgment, order or decree made under the provisions of sections 211.011 to 211.431 which adversely affects him. Notice of appeal shall be filed within thirty days after the final judgment, order or decree has been entered but neither the notice of appeal nor any motion filed subsequent to the final judgment acts as a *supersedeas* unless the court so orders. (L.1957 p. 642 § 1 [§ 211.260])

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RECEIVED
MAY 12 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 79-6584

In the Matter of

SHERYL ANN TRAPP, DEE ANN TRAPP,
and DUANE EDWIN TRAPP, Minors,

ROBERT EMERY TRAPP, Father,
LINDA MAE TRAPP, Mother and
Appellant.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53, paragraph 1, of the Rules of this Court, motion is hereby made that the appellant, Linda Mae Trapp, be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavit. Appellant further requests, in the event review of her appeal is granted, that this Court appoint to represent her Mr. James L. Muller, of Kansas City, Missouri, who is a member of the bar of this Court, and who has represented her thus far in her case and is willing to continue to serve as her attorney.

Linda Mae Trapp
LINDA MAE TRAPP

James L. Muller
JAMES L. MULLER
Legal Aid of Western Missouri
330 Professional Building
1103 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6750
Attorney for Appellant

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

I, Linda Mae Trapp, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis without being required to prepay costs or fees:

1. I am the appellant in the within entitled cause.

2. Because of my poverty I am unable to pay the fees and costs of said cause, and still provide myself and the oldest of my four minor dependent children with the necessities of life.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek herein.

5. The nature of said cause is briefly stated as follows: I am the defendant in a child neglect proceeding in the Juvenile Court of Henry County, Missouri, wherein I am seeking to set aside said Court's custody order of January 2, 1973, on the ground that said order is null and void because it was entered in violation of the Due Process Clause of the Fourteenth Amendment and it has been and is depriving me of my fundamental constitutional right to the immediate companionship, care, custody, and management of my three younger children. I am also seeking in said proceeding to set aside the Juvenile Court's child support order of February 27, 1973, on the ground that said order is null and void because it was entered without affording me my Fourteenth Amendment due process rights to prior notice and a hearing or an opportunity to be heard thereon.

Linda Mae Trapp
LINDA MAE TRAPP

Subscribed and sworn to before me, the undersigned, this 8th day of May, 1980.

NOTARY SEAL — NOTARY PUBLIC — STATE OF MISSOURI

Mabel Homm
Notary Public in and for said County and State

My commission expires:

MABEL HOMM
Notary Public - State of Missouri
Commissioned in Jackson County
My Commission Expires April 17, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6584

In the Matter of

SHERYL ANN TRAPP, DEE ANN TRAPP,
and DUANE EDWIN TRAPP, Minors,

ROBERT EMERY TRAPP, Father,
LINDA MAE TRAPP, Mother and
Appellant.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

APPELLANT'S SUPPLEMENTAL MEMORANDA

JAMES L. MULLER
Legal Aid of Western Missouri
400 Professional Building
1103 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6750
Attorney for Appellant

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6584

In the Matter of

SHERYL ANN TRAPP, DEE ANN TRAPP,
and DUANE EDWIN TRAPP, Minors,

ROBERT EMERY TRAPP, Father,
LINDA MAE TRAPP, Mother and
Appellant.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

APPELLANT'S SUPPLEMENTAL MEMORANDA

The appellant, Linda Mae Trapp, makes the following responses to the series of questions propounded by the Office of the Clerk of this Court in its letter of March 29, 1982:

I.

The child, Robert Emery Trapp, is now 14 years old (born 1-9-68); Sheryl Ann Trapp is almost 13 (born 4-25-69); Dee Ann Elaine Trapp is 12 (born 4-7-70); and Duane Edwin Trapp is 9 (born 9-8-72). None of the children have reached the age of majority.

The oldest child, Robert, has been returned to his parents and is living with his mother (the appellant) and his stepfather in Kansas City, Jackson County, Missouri.

The three youngest children continue to be in the legal custody of the Henry County Office of the Missouri Division of Family Services under the order of custody entered in the neglect proceeding on January 2, 1973, by the Juvenile Division of the Circuit Court of Henry County, Missouri. The children are living in foster family homes where they have been placed by the Division of Family Services which retains the right to supervise the care of the children and to resume custody thereof. Sheryl is living with foster parents who have been permitted to remove her to Mounds, Oklahoma. Dee Ann is living with foster parents in Clinton, Henry County, Missouri. Duane is living with foster parents who have been permitted to remove him to Evergreen, Colorado.

None of the three youngest children have been adopted by their foster parents, and no proceedings for adoption are pending. The legal status of these children has not changed in any way that affects the questions presented in the jurisdictional statement in this case.

II.

The children's father, Robert Emery Trapp, is now 42 years old (born 8-18-39) and is living in Kansas City, Jackson County, Missouri. The children's mother (the appellant) is 32 (born 12-7-49) and since April of 1977, has been married to and living with Robert Brault in Kansas City, Jackson County, Missouri. Appellant has no children other than the four described herein, and she has had an operation which prevents her from having any more children.

Mr. Brault is 26 years old (born 11-6-55) and has no children of his own. He has developed a close relationship with appellant's oldest child, Robert, and is endeavoring with appellant to secure the return of her three youngest children.

The parental rights of appellant and the children's father have not been terminated with respect to any of their natural children. The legal status of the parents has not changed in any way that affects the questions presented in the jurisdictional statement in this case.[1]

III.

Sections 211.031 and 211.181 RSMo 1969 (J.S. App. E at 1, 2-3) have been amended as appears in §§211.031 and 211.281 RSMo Supp. 1981 which are set forth in the Appendix hereto. None of the other statutory provisions involved has been amended.

The amendment of §211.181 has in no way affected any of the seven questions presented in the jurisdictional statement in this

---

[1] The fact of appellant's remarriage does not affect her parental rights. Missouri recognizes that the rights of the parents are not joint, but several; the right of each parent to the companionship, care, custody, and management of his or her minor children is separate and distinct from the right of the other parent. §211.477 RSMo 1978; §211.501 RSMo 1969.

case.

The amendment of §211.031 affects appellant's subsidiary Question I(A) alone and only in part. See J.S. at 20-30. The neglect standard embodied in §211.031(1)(a) RSMo 1969 -- "proper support . . ., medical, surgical or other care necessary for [the child's] well-being" -- remains unchanged in §211.031.1(1)(a) RSMo Supp. 1981. The neglect standard embodied in §211.031(1)(b) RSMo 1969 -- "otherwise without proper care, custody or support" -- likewise remains unchanged in §211.031.1(1)(b) RSMo Supp. 1981. The neglect standard embodied in §211.031(1)(c) RSMo 1969 -- "behavior, environment or associations . . . injurious to [the child's] welfare or to the welfare of others" -- has been changed in §211.031.1(2)(d) RSMo Supp. 1981 to: "behavior or associations . . . injurious to [the child's] welfare or to the welfare of others."

In other words, under the amendment of §211.031 Missouri no longer has the standard of an "environment . . . injurious to [the child's] welfare," but it retains the other vague and overboard standards of "proper care, custody or support," and of "proper . . . care necessary for [the child's] well-being."

IV.

The termination proceeding at issue in In re Trapp, 528 S.W.2d 489 (Mo.App. 1975), was reversed outright. The proceeding for the termination of parental rights to the child, Sheryl, at issue in State ex rel. Brault v. Kyser, 562 S.W.2d 172 (Mo.App. 1978), is still pending on appellant's motion to dismiss. See J.S. at 15, 16. The Missouri Supreme Court has not entered any orders with regard to the latter proceeding since its decision in In the Matter of Sheryl Ann Trapp, et al., 593 S.W.2d 193 (Mo.banc 1980).

V.

No aspects of this case have become moot since appellant's last filing with this Court, and no other relevant events have occurred which might affect this case.

VI.

In light of this Court's decision in Santosky v. Kramer, No. 80-5889 (March 24, 1982), appellant submits that the

appropriate disposition of the appeal in this case is to note probable jurisdiction and set the case for plenary briefing and argument. Santosky deals with the termination or permanent deprivation of parental rights while this case involves the "temporary" or nonfinal deprivation of such rights. The holding in Santosky is therefore not necessarily dispositive of appellant's claim under Question IV (J.S. at 40-41) that due process requires at least the "clear and convincing evidence" standard of proof in a "temporary" neglect proceeding. At the same time, the reasoning in Santosky plainly supports the substantiality of the federal question presented in appellant's Question IV.

The substantial nature of several of the other questions presented has been recognized by this Court. Appellant's claim under Question I(A) (J.S. at 20-30) that the Missouri neglect statutes are unconstitutionally vague and overbroad is essentially the same as Question I in the jurisdictional statement in Doe v. Delaware, No. 79-5932, as to which this Court noted probable jurisdiction. 445 U.S. 942 (1980).

Appellant's claim under Question I(B) (J.S. at 30-34) that due process requires the showing of a threshold of harm sufficient to demonstrate a compelling state interest, is essentially the same as Question III in the jurisdictional statement in Doe v. Delaware, as to which this Court noted probable jurisdiction as aforesaid. Although the appeal of that case was finally dismissed, it was not "for want of a substantial federal question," but "for want of a properly presented federal question." 450 U.S. 392 (1981).

Respectfully submitted,

James L. Muller

James L. Muller
Legal Aid of Western Missouri
400 Professional Building
1103 Grand, Fourth Floor
Kansas City, MO 64106
(816) 474-6750
Attorney for Appellant

RSMo Supp 1981

by the commissioner, and to any other person that the court may direct. This notice may be given at the hearing, or by certified mail or other service directed by the court.

(L. 1967 p. 332 § 3, A. L. 1980 S. B. 512)

211.023. Rehearing, motion filed when—judge may sustain or deny—commissioner's finding final, when.—The minor and his parents, guardian or custodian are entitled to file with the court a motion for a hearing by a judge of the juvenile court within fifteen days after receiving notice of the findings of the commissioner. The judge shall promptly rule on such motion and, in his discretion, may either sustain or deny the motion, and if the motion is sustained, the judge shall set a date for a hearing. If the motion is denied, or if no such motion is filed, the findings and recommendations of the commissioner shall become the decree of the court when adopted and confirmed by an order of the judge. The final order of the court shall, in any event, be proof of such adoption and confirmation and also of the fact that the matter was duly referred to the commissioner.

(L. 1967 p. 332 § 4, A. L. 1980 S. B. 512)

211.031. Juvenile court to have exclusive jurisdiction when—exceptions.—1. Except as otherwise provided herein, the juvenile court shall have exclusive original jurisdiction in proceedings:

(1) Involving any child who may be a resident of or found within the county and who is alleged to be in need of care and treatment because:

(a) The parents or other persons legally responsible for the care and support of the child neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his well-being; except that reliance by a parent, guardian or custodian upon remedial treatment other than medical or surgical treatment for a child shall not be construed as neglect when the treatment is recognized or permitted under the laws of this state; or

(b) The child is otherwise without proper care, custody or support;

(2) Involving any child who may be a resident of or found within the county and who is alleged to be in need of care and treatment because:

(a) The child while subject to compulsory school attendance is repeatedly and without justification absent from school; or

(b) The child disobeys the reasonable and lawful directions of his parents or other custodian and is beyond their control; or

(c) The child is habitually absent from his home without sufficient cause, permission, or justification; or

(d) The behavior or associations of the child are otherwise injurious to his welfare or to the welfare of others; or

(e) The child is charged with an offense not classified as criminal, or with an offense applicable only to children; except that, the juvenile court shall not have jurisdiction over any child sixteen years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony;

(3) Involving any child who is alleged to have violated a state law or municipal ordinance, or any person who is alleged to have violated a state law or municipal ordinance prior to attaining the age of seventeen years, in which cases jurisdiction may be taken by the court of the circuit in which the child or person resides or may be found or in which the violation is alleged to have occurred; except that, the juvenile court shall not have jurisdiction over any child sixteen years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony;

(4) For the adoption of a person;

(5) For the commitment of a child to the guardianship of the department of social services as provided by law.

2. If the child resides in a county of this state and the proceeding is commenced in a juvenile court of another county, the juvenile court in the county in which the proceeding is commenced may, on motion of either party or on its own motion made prior to final disposition, transfer the proceeding to the county of the child's residence for further action. The proceeding may also be transferred if the residence of the child changes pending the proceeding. Certified copies of all legal and social documents and records pertaining to the case on file with the clerk of the transferring juvenile court shall accompany the transfer.

3. In any proceeding involving any child taken into custody in a county other than the county of the child's residence, the juvenile court of the county of the child's residence shall be notified of such taking into custody within seventy-two hours.

(L. 1957 p. 642 § 211.030, A. L. 1976 S. B. 511, A. L. 1980 S. B. 512)

RSMo Supp 1981

2. The services of a state, county or municipally maintained hospital, institution, or psychiatric or health clinic may be used for the purpose of this examination and treatment.

3. A county may establish medical, psychiatric and other facilities, upon request of the juvenile court, to provide proper services for the court in the diagnosis and treatment of children coming before it and their facilities shall be under the administration and control of the juvenile court. The juvenile court may appoint and fix the compensation of such professional and other personnel as it deems necessary to provide the court proper diagnostic, clinical and treatment services for children under its jurisdiction.

(L. 1957 S. 642 § 211.180, A. L. 1980 H. B. 1724)

(1980) The requirement that the fee for a psychiatric examination of children by court appointed physician be paid by the county does not mean that the expense of such examination should be taxed as "costs". State ex rel. Mo. v. J.E.L. (Mo.) 606 S.W.2d 653.

211.181. Order for disposition or treatment of child within jurisdiction—suspension of order and probation granted, when.—1. When a child is found by the court to come within the applicable provisions of subdivision (1) of subsection 1 of section 211.031, the court shall so decree and make a finding of fact upon which it exercises its jurisdiction over the child and the court may, by order duly entered, proceed as follows:

(1) Place the child under supervision in his own home or in the custody of a relative or other suitable person after the court or a public agency or institution designated by the court conducts an investigation of the home, relative or person and finds such home, relative or person to be suitable and upon such conditions as the court may require;

(2) Commit the child to the custody of:

(a) A public agency or institution authorized by law to care for children or to place them in family homes; except that, such child may not be committed to the department of social services, division of youth services;

(b) Any other institution or agency which is authorized or licensed by law to care for children or to place them in family homes;

(c) An association, school or institution willing to receive the child in another state if the approval of the agency in that state which administers the laws relating to importation of children into the state has been secured; or

(d) The juvenile officer;

(3) Place the child in a family home;

(4) Cause the child to be examined and treated by a physician, psychiatrist or psychologist and * when the health or condition of the child requires it, cause the child to be placed in a public or private hospital, clinic or institution for treatment and care; except that, nothing contained herein authorizes any form of compulsory medical, surgical, or psychiatric treatment of a child whose parents or guardian in good faith are providing other remedial treatment recognized or permitted under the laws of this state.

2. When a child is found by the court to come within the provisions of subdivision (2) of subsection 1 of section 211.031, the court shall so decree and upon making a finding of fact upon which it exercises its jurisdiction over the child the court may, by order duly entered, proceed as follows:

(1) Place the child under supervision in his own home or in custody of a relative or other suitable person after the court or a public agency or institution designated by the court conducts an investigation of the home, relative or person and finds such home, relative or person to be suitable and upon such conditions as the court may require;

(2) Commit the child to the custody of:

(a) A public agency or institution authorized by law to care for children or place them in family homes; except that, a child may be committed to the department of social services, division of youth services, only if he is presently under the court's supervision after an adjudication under the provisions of subdivision (2) or (3) of subsection 1 of section 211.031;

(b) Any other institution or agency which is authorized or licensed by law to care for children or to place them in family homes;

(c) An association, school or institution willing to receive it in another state if the approval of the agency in that state

RSMo Supp 1981

which administers the laws relating to importation of children into the state has been secured; or

(d) The juvenile officer;

(3) Place the child in a family home;

(4) Cause the child to be examined and treated by a physician, psychiatrist or psychologist and when the health or condition of the child requires it, cause the child to be placed in a public or private hospital, clinic or institution for treatment and care, except that nothing contained herein authorizes any form of compulsory medical, surgical, or psychiatric treatment of a child whose parents or guardian in good faith are providing other remedial treatment recognized or permitted under the laws of this state.

Execution of any order entered by the court pursuant to this subsection, including a commitment to any state agency, may be suspended and the child placed on probation subject to such conditions as the court deems reasonable. After a hearing, probation may be revoked and the suspended order executed.

3. When a child is found by the court to come within the provisions of subdivision (3) of subsection 1 of section 211.031, the court shall so decree and make a finding of fact upon which it exercises its jurisdiction over the child and the court may, by order duly entered, proceed as follows:

(1) Place the child under supervision in his own home or in custody of a relative or other suitable person after the court or a public agency or institution designated by the court conducts an investigation of the home, relative or person and finds such home, relative or person to be suitable and upon such conditions as the court may require;

(2) Commit the child to the custody of:

(a) A public agency or institution authorized by law to care for children or to place them in family homes;

(b) Any other institution or agency which is authorized or licensed by law to care for children or to place them in family homes;

(c) An association, school or institution willing to receive it in another state if the approval of the agency in that state which administers the laws relating to importation of children into the state has been secured; or

(d) The juvenile officer;

(3) Place the child in a family home;

(4) Cause the child to be examined and treated by a physician, psychiatrist or psychologist and * when the health or condition of the child requires it, cause the child to be placed in a public or private hospital, clinic or institution for treatment and care, except that nothing contained herein authorizes any form of compulsory medical, surgical, or psychiatric treatment of a child whose parents or guardian in good faith are providing other remedial treatment recognized or permitted under the laws of this state;

(5) Suspend or revoke a state or local license or authority of a child to operate a motor vehicle;

(6) Order the child to make restitution or reparation for the damage or loss caused by his offense. In determining the amount or extent of the damage, the court may order the juvenile officer to prepare a report and may receive other evidence necessary for such determination. The child and his attorney shall have access to any reports which may be prepared, and shall have the right to present evidence at any hearing held to ascertain the amount of damages. Any restitution or reparation ordered shall be reasonable in view of the child's ability to make payment or to perform the reparation. The court may require the clerk of the circuit court to act as receiving and disbursing agent for any payment ordered;

(7) Order the child to a term of community service under the supervision of the court or of an organization selected by the court.

Execution of any order entered by the court, including a commitment to any state agency, may be suspended and the child placed on probation subject to such conditions as the court deems reasonable. After a hearing, probation may be revoked and the suspended order executed.

(L. 1957 p. 642 § 211.200, A. L. 1974 H. B. 1475, A. L. 1980 S. B. 512)

* Word "and" omitted inadvertently in original rolls by typographical error

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Appellant's Supplemental Memoranda upon the Appellee herein by mailing a copy thereof, postage prepaid, to Mr. Louren R. Wood, Assistant Attorney General, Supreme Court Building, Jefferson City, Missouri 65101, on this 16th day of April, 1982; and I further certify that all parties required to be served have been served.

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No. 79-6584

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

IN THE MATTER OF SHERYL ANN TRAPP, ET AL.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO AFFIRM

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TABLE OF AUTHORITIES

CASES

Page

Alsager v. District Court of Polk County, 406 F.Supp. 10 (S.D. Ia. 1975); aff'd, 545 F.2d 1137 (8th Cir. 1976) 16

Bowers v. State, 389 A.2d 341 (Md. 1978) 14

D. M. v. State, 515 P.2d 1234 (Alas. 1973) 17

Gonzales v. Texas Department of Human Resources, 518 S.W.2d 522, 530-531, (Tex. App. 1979) (Cert. den.; No. 79-913, 2-25-80) 15

In Interest of Dimmitt, 560 S.W.2d 368 (Mo.App. K.C. 1977) 9

In Matter of Five Minor Children, 407 A.2d 199 (Del. 1979) (prob. juris. noted, No. 79-5932; 3-24-80) 16

In re Ayres, 513 S.W.2d 731 (Mo. App. St. L. 1974) 9

In re Interest of Metteer, 279 N.W.2d 374 (Neb. 1979)... 12

In re C____F____ B____, 497 S.W.2d 831 (Mo. App. K. C. 1973) 8

In re I. M. J., 428 S.W.2d 18 (Mo. App. Spr. 1968) 7

In re M____ P____ S____, 342 S.W.2d 277 (Mo. App. St. L. 1961) 7

In re Marriage of Wofford, 589 S.W.2d 323 (Mo. App. S.D. 1979) 10

In re Trapp, 528 S.W.2d 489 (Mo. App. K. C. 1975) 2

In re William L., 383 A.2d 1228 (Pa. 1978) (cert. den. 439 U.S. 880 (1978) 14

Matter of Trapp, 593 S.W.2d 193 (Mo. banc 1980) 2, 11

Minor Children of F. B. Caruthers, 323 S.W.2d 397 (Mo. App. S. L. 1959) 6, 11

People v. Schoos, 305 N.E.2d 560 (Ill. App. 1973) 11

Petition of Department of Public Welfare, 381 N.E.2d 565 (Mass. 1978) 17

Page

Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944) 18
Roe v. Conn, 417 F.Supp. 769 (M.D. Ala. 1976) 16, 19
Smith v. Goguen, 415 U.S. 566, 574, 616 (1974) 21
Stanley v. Illinois, 405 U.S. 551 (1972) 19
State ex rel. Brault v. Kyser, 562 S.W. 172 (Mo. App. K.C. 1978) 2
State v. McMaster, 486 P.2d 567 (Or. 1971) 13
U. S. Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 578-579 (1973) 21
Wisconsin v. Yoder, 406 U.S. 205, 243 (1972) 19

STATUTES

§§ 211.011 to 211.431, RSMo. 1
§ 211.241, RSMo. 2
§§ 211.442 to 211.492, RSMo. 2
§ 211.010-2, RSMo 1949 3
§ 211.011, RSMo 3
§ 211.021(4), RSMo 4
§ 211.031, RSMo 4, 5, 8, 9
§ 211.081, RSMo 4
§ 211.091, RSMo 5, 6
§ 211.181, RSMo 5, 6
§ 211.241, RSMo 6
§ 211.251, RSMo 6
Ill. Rev. Stat. Ch. 37, § 702-4 11
Pa. Stat. § 311(2) 15
§ 15-02(1) (D), Texas Family Code 15
13 Del. C. § 1103 (4) 15
§ 232.41, Code of Iowa (1965) 17
Title 13, § 350(2), Ala. Code 20

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In December 1972, respondent's predecessor as juvenile officer of Henry County, Missouri, instituted proceedings pursuant to Missouri's child neglect law §§ 211.011 to 211.431 RSMo, to inquire into the continued custody of four infant children, ranging from five years to three months in age, the natural offspring of appellant Linda Mae Trapp and her husband Robert Emery Trapp, then residents of the community of Montrose in Henry County. Based upon a hearing conducted in January of 1973, attended by Mrs. Trapp and her appointed counsel, Juvenile (and Circuit) Judge Kelso Journey ordered transfer of custody of the children to the county unit of the State Division of Family Services.

Missouri law directs that the procedure be formal or informal at the discretion of the judge and that the judge is to inquire into the habits, surroundings, conditions and tendencies of the child in order to promote its best welfare. Only persons with a direct interest may attend the hearing, the affected child's presence or absence is to be determined by the judge, and a recording of the testimony at the hearing will be made only if ordered by the judge or requested by any party. Section 211.171. A record was not made of the January, 1973 hearing.

The following month, Judge Journey entered an order based on § 211.241 directing the Trapps to contribute to the support of three of the children while their custody was elsewhere. The Trapps made numerous attempts in the ensuing years to set aside these orders, included in which were challenges to the constitutionality of the Missouri law, and upon denial of relief in September 1978 by Judge Journey's successor, Judge Harold Kyser, they appealed to the Supreme Court of Missouri. The Supreme Court of Missouri unanimously upheld the constitutionality of the Missouri child neglect law, but three of the seven members dissented from the affirmance of the order of support. *Matter of Trapp*, 593 S.W.2d 193 (Mo. banc 1980). It is this decision which is the object of the instant appeal.

Acting under the termination of parental rights law §§ 211.442 to 211.492, Judge Journey ordered the termination of the parental rights of the Trapps in 1974 but the Missouri Court of Appeals in Kansas City determined this order was unjustified and reversed it. *In re Trapp*, 528 S.W.2d 489 (Mo. App. K. C. 1975). Institution in 1977 of a proceeding to terminate the parental rights of Linda Mae Brault (formerly Trapp) to one or more of the children of her prior marriage is reflected in *State ex rel. Brault* v. *Kyser*, 562 S.W.2d 172 (Mo. App. K. C. 1978).

From 1903 until 1957, the Missouri law providing for the neglected child who could be placed in the custody of other than his parents described as its subject:

> . . . any child under the age of seventeen years, who is destitute or homeless or abandoned, or dependent upon the public for support, or who habitually begs or receives alms, is found living in any house of ill-fame, or with any vicious or disreputable person, or who is suffering from the cruelty or depravity of its parents, or other person in whose care it may be; and any child who while under the age of ten years is found peddling or selling any articles or singing or playing any musical instrument for gain upon the street or giving any public entertainments or accompanies, or used in any aid of any person so doing." § 211.010-2 RSMo 1949.

In 1957 the essence of the present child neglect law was enacted and it included these provisions:

> "The purpose of this chapter is to facilitate the care, protection and discipline of children who come with the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them." § 211.011
>
> " 'Legal custody' means the right to the care, custody and control of a child and the duty to pro-

vide food, clothing, shelter, ordinary medical care, education, treatment and discipline of a child. Legal custody may be taken from a parent only by court action and if the legal custody is taken from a parent without termination of parental rights, the parent's duty to provide support continues even though the person having legal custody may provide the necessities of daily living." § 211.021 (4) "... [T]he juvenile court shall have exclusive original jurisdiction in proceedings:

(1) Involving any child ... who is alleged to be in need of care and treatment because:

(a) The parents ... neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his well-being; ... or

(b) The child is otherwise without proper care, custody or support; or

(c) The behavior, environment or associations of the child are injurious to his welfare or to the welfare of others; ...." § 211.031

"Whenever any person informs the court in person and in writing that a child appears to be within the purview ... of section 211.031, the court shall make or cause to be made a preliminary inquiry to determine the facts and to determine whether or not the interests of the public or of the child require that further action be taken. On the basis of this inquiry the juvenile court may make such informal adjustment as is practicable without a petition or may authorize the filing of a petition by the juvenile officer." § 211.081

"2. The petition shall set forth plainly:

(1) The facts which bring the child within the jurisdiction of the court;

(2) The full name, birth date, and residence of the child;

(3) The names and residence of his parents, if living; . . .

(5) Any other pertinent data or information. . . ." § 211.091

"When a child is found by the court to come within the applicable provisions of section 211.031, the court shall so decree and make a finding of fact upon which it exercises its jurisdiction over the child and the court may, by order duly entered, proceed as follows:

(1) Place the child under supervision in his own home or in custody of a relative or other suitable person upon such conditions as the court may require;

(2) Commit the child to the custody of:

(a) A public agency or institution authorized by law to care for children or to place them in family homes;

(b) Any other institution or agency which is authorized or licensed by law to care for children or to place them in family homes; . . . or

(3) Place the child in a family home;

(4) Cause the child to be examined and treated by a physician, . . . and when the health or condition of the child requires it, cause the child to be placed in a public or private hospital, clinic or institution for treatment and care, ..." § 211.181

> "When the juvenile court finds a child to be within the purview of applicable provisions of section 211.031 it may in the same or subsequent proceedings, either on its own motion or upon the application of any person, institution or agency having the custody of such child, proceed to inquire into the ability of the parent of the child to support it or to contribute to its support. . . ." § 211.241
>
> "1. A decree of the juvenile court made under the provisions of section 211.181 may be modified at any time on the court's own motion.
>
> 2. The parent, guardian, legal, custodian, spouse, relative or next friend of a child committed to the custody of an institution or agency may, at any time, petition the court for a modification of the order of custody. The court may deny the petition without hearing or may, in its discretion, conduct a hearing upon the issues raised and may make any orders relative to the issues as it deems proper." . . . § 211.251

Not long after this law went into effect, the state Court of Appeals in St. Louis considered a due process challenge that it was vague, indefinite and uncertain and hence not a proper basis for taking the custody of three minor children from their mother. *Minor Children of F. B.* v. *Caruthers,* 323 S.W.2d 397 (Mo. App. St. L. 1959). In rejecting the challenge, the court observed:

> ". . . The statute deals with children in need of care that they are not receiving and this may arise in so many ways that it would be impossible to state them all with great exactitude. . . .
>
> It is of course true that while the court is

> grant wide judicial discretion by the act, that discretion must be exercised, . . . with great regard for the rights of all parties concerned. That includes the natural right of the parent to the custody of his child. . . . Any restriction of the parental right must be cautiously imposed and such restriction should never be greater than that which is necessary to promote the welfare of the child. . . ." 323 S.W.2d at 401.

The various appellate courts of Missouri have subsequently and with some frequency applied judicial gloss to the 1957 legislation. In so doing their attitude in general seems to be characterized by a concern for the preservation of the natural parent-child relationship and custodianship. Excerpts from some of these opinions are as follows:

In re M____ P____ S____, 342 S.W.2d 277 (Mo.App. St. L. 1961):

> ". . . [A] mother is not to be deprived of the care, companionship and responsibility of her child except for grave reasons and such as are authorized by legislative enactment; that she is presumed to be qualified for the natural privilege of the primary right to custody; and that whosoever seeks to deny a mother that privilege carries the burden of proof." 342 S.W.2d at 279.

In Re I. M. J., 428 S.W.2d 18 (Mo. App. Spr. 1968):

> ". . . It is not the purpose of statutory neglect proceedings to find substitute or foster parents for children; the State has an interest in the integrity of the family, and in such proceedings parental rights should be limited only 'to the extent necessary to achieve the most desirable goal, wherever possible, of reinstating the natural and nor-

mal parent and child relationship.' . . . " 428 S.W.2d at 22.

In Re C____ F____ B____, 497 S.W.2d 831 (Mo. App. K. C. 1973):

". . . [T]he central issue of this case. . . [is] . . . whether the parents were guilty of 'neglect' so as to give the Juvenile Court jurisdiction under § 211.031. This statutory prerequisite to jurisdiction is not a term having a fixed and rigid meaning. . . . 'Neglect, as a concept, permits of no certainity, and protection from vagueness must be found in the wisdom of judges rather than the detail of statute.' . . ." 497 S.W.2d at 834

"The difficulty of applying these general rules in specific cases lies in reconciling the needs of the child with the rights and privileges of parents and of both with the interest of the state in safeguarding children upon whom its entire future depends. The perplexities of arriving at a fair balance of these sometimes conflicting factors has . . . the court being called upon not only to interpret the statutory language but also to give its 'estimate of the human situation.' . . . ." 497 S.W.2d at 835.

"The ultimate question in this case comes down to whether state employed professionals shall be permitted to substitute their judgment for that of the parents. No sanction for that type of substitution is granted by the law, unless there is neglect on the part of the parents. No neglect is shown on the facts of this case. 'Neglect' for this purpose must be understood as a failure by the parents to supply the minimum quality of care which the community will tolerate. . . . " 497 S.W. 2d at 837.

In Re Ayres, 513 S.W.2d 731 (Mo. App. St. L. 1974):

> ". . . Yet, at all times she evidenced a continuing maternal concern and interest in her daughter. Besides there is not evidence that the mother at any time abandoned Bonnie. Abandonment must be wilful or a course of conduct which impliedly shows a conscious disregard or indifference to the child in respect to one's maternal obligations owed to the child . . . ." 513 S.W.2d at 735.

In Interest of Dimmitt, 560 S.W.2d 368 (Mo. App. K. C. 1977):

> "Section 211.031(1)(a). . . legislatively recognizes the power of the state, acting by and through the Juvenile Division of the Circuit Court in the capacity of parens patriae, to assume direction, control and custody of minor children when certain carefully prescribed conditions are found to exist. However, it is not within the province of the juvenile courts to determine generally what conditions or exigencies warrant their intervention between parent and child. Establishing the nature and limit of the conditions and exigencies which warrant judicial intervention is a legislative prerogative as reflected by the firmly accepted principle that 'juvenile courts are courts of limited jurisdiction and may exercise only such powers as are conferred by statute.' . . . .
>
> The legislature has responsibly exercised its prerogative by wisely refraining from vesting juvenile courts with broad, unlimited authority to intervene between parent and child. In doing so it has evinced awareness of a misty but irrefutable truth—immeasurable intangible values are attached to the relationship between children and

their natural parents which cannot be supplied by others regardless of how exemplary their intentions may be . . . . The right of natural parents to have custody of their minor children, unless their welfare is manifestly jeopardized by reason of parental unfitness, is considered inviolate and vigilantly guarded. . . ." 560 S.W.2d at 371.

"An ever increasing trend is abroad to separate natural parents and their children for every imaginable reason. Its continued indulgence seriously jeopardizes the unique role of the family as the principal bastion of security for children. . . . In raw core terminology, neglect statutes were never intended to surreptitiously destroy the natural custodial rights of parents of factually unneglected children. Placing minor children in an artificial, tri-structured atmosphere consisting of child, foster parent and social worker should never be abstractly viewed as a priority solution." 560 S.W.2d at 372-373.

In re Marriage of Wofford, 589 S.W.2d 323 (Mo.App. S.D. 1979):

". . . A minor child should not be placed in the custody of a third person except as a necessary expedient, usually temporarily, until one of the parents becomes physically and economically capable of having custody, and permanent placement with a third person is done only when both parents are unfit to have custody. . . ." 589 S.W. 2d at 326.

"The care and affection which a parent normally exhibits for a child is not to be taken lightly. There is no evidence in the transcript that either party was morally unfit or any indication

> that either had anything but love and affection for the children. By giving deference to the trial court, we believe there was sufficient evidence to place the children with the Division of Family Service temporarily, until one or the other parent could make satisfactory arrangements for caring for the children. Considerable time has passed since the trial, and we do not know what the present circumstances may be. We believe it would be in the best interests of the children to remand the case for further evidence, to determine who should have custody as it may be shown at the time. . . .''* 589 S.W.2d at 326.

The 1959 decision of the St. Louis Court of Appeals in *Minor children of F. B.* v. *Caruthers*, 323 S.W.2d 397 was ratified and considerably relied upon in the present case by the Supreme Court of Missouri in rejecting appellant's challenge that the Missouri child neglect law is unconstitutionally vague. 593 S.W.2d at 203. In this regard, the Missouri court also relied upon decisions of the Supreme Courts of Nebraska, South Dakota, Vermont and a court of appeals in Illinois. The latter decision, *People* v. *Schoos*, 305 N.E.2d 560 (Ill. App. 1973) (app. dis. for want of sub. Fed. quest., 417 U.S. 963 (1974)), dealt with the Illinois child neglect statute, quite similar to that of Missouri's, which identified a negelected child as one:

> ''. . . negelected as to proper or necesary support, education as required by law, or as to medical . . . or other care necessary for his well-being . . . or . . . whose environment is injurious to his welfare or whose behavior is injurious to his own welfare or that of others.'' Ill. Rev. State. Ch. 37, § 702-4.

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*A like disposition has occurred in the present case. 593 S.W.2d at 206.

In its opinion, the Illinois court said:

> "Child neglect is by its very nature incapable of a precise and detailed definition and . . . the child neglect statute does not infringe upon any of the basic liberties protected by the United States Constitution. The United States Supreme Court has never held a parent has the right to treat his child as he wishes subject only to limited and strictly defined state intervention. . . . . Consequently, the statute need not meet the higher standard of specificity than is ordinarily applied.
>
> The state does have a compelling interest to protect children from abuse and neglect, and to narrow the statute would have the effect of diminishing the rights of children who have no other means of protecting themselves . . . ." 305 N.E.2d at 562.

The Nebraska decision relied upon by the Missouri Supreme Court was *In re Interest of Metteer*, 279 N.W.2d 374 (Neb. 1979), wherein the court stated on the vagueness issue:

> "The argument of the appellant, carried to its logical extreme, would require that in order for a statute to meet constitutional standards it must contain a precise checklist of parental responsibilities as well as a list of prohibitions. Society does not operate in a historical, social, or moral vacuum. The term used in the statute, while broad, must be interpreted in the light of our history, culture, generally accepted standards of morality, and the common understanding of the behavior of reasonably conscience and well-intentioned parents." 279 N.W.2d at 377-378.

Although technically distinguished from the present case because it involved the Oregon law on termination of parental rights rather than a law authorizing temporary deprivation of custody due to a parent neglecting its child, the Supreme Court of Oregon in *State* v. *McMaster*, 486 P2d 567 (Or. 1971) expressed the following philosophy as to the required degree of legislative guidance in this area:

> ". . . While the juvenile code is administered by courts, the code directs the juvenile courts to act in some manners similar to a social administrative agency. Much of the code and much of the juvenile courts budget is devoted to the proper disposition of the child after the child comes within the court's jurisdiction. To adequately perform this function the legislature reasonably deemed it necessary to give the juvenile court greater flexibility than may be thought desirable for a court functioning in its criminal role." 486 P.2d at 569-570.
>
> "In our opinion, to accomplish its primary purpose of caring for the welfare of the child, the legislature would have extreme difficulty being more specific. The legislature could specify certain conduct upon the part of the parents which would cause them to be deprived of their parental rights; however, that is not the intent of the legislature or of this court in interpreting this statute. The legislature and this court do not desire to sever parental rights for any conduct by the parents unless such conduct seriously affects the child's welfare . . . . . " 486 P.2d at 570.
>
> ". . . We would hope that in the case of the McMasters, or any parents, there is no need for an explicit statute to 'spell out' how poorly they can treat their child before risking loss of their parental rights.

> If some notice of conduct which will cause a result is required in a noncriminal statute, the parental rights statute gives adequate notice of the kind of conduct involved and the result which will occur. The conduct is of a kind detrimental to the child, not beneficial. It is not just any detrimental conduct but seriously detrimental conduct. We see no policy to be furthered by attempting to elaborate on what conduct is seriously detrimental and what is not. The ordinary parent should 'get the message' from the statute as it is now worded." 486 P.2d at 571.

An attitude of the Maryland Court of Appeals on the subject of precision in child welfare legislation was expressed in *Bowers* v. *State*, 389 A.2d 341 (Md. 1978) as follows:

> ". . . But in drafting a statute intended to deal with the problem as complex as child abuse, the Legislature is not required to spell out the prohibited acts in elaborate detail. To do so would likely be counterproductive. In our opinion, the definition of abuse challenged in the case at hand represents a most suitable compromise between the constitutionally mandated requirements of specificity and the practical need to devise language flexible enough to combat a social evil of truly inestimable portions. . . . " 389 A.2d at 350.

The Pennsylvania statute on termination of parental rights was held to be sufficiently specific in the case of *In re William L.*, 383 A.2d 1228 (Pa. 1978) (cert. den. 439 U.S. 880 (1978); Brennan, White and Marshall would grant cert.) The Pennsylvania statutory standard was:

> "The repeated and continued incapacity abuse, neglect, or refusal of the parent has caused

> the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent." Pa. Stat. § 311(2).

The Pennsylvania Supreme Court observed:

> "The language of § 311(2) does not admit of an interpretation permitting termination of parental rights based upon personal preferences or speculative concepts of proper child rearing. The needs of the child unmet by the parent must be 'essential' and 'necessary' to his 'physical or mental well-being.' In addition, the evidence must establish that the causes and conditions of the deprivation 'cannot or will not be remedied.' " 383 A.2d at 1234.

The legislative standard in Texas for the termination of the parent-child relationship is:

> "The parent has . . . knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child . . . and . . . termination is in the best interest of the child." § 15-02(1) (D) (2), Texas Family Code.

This standard was held not to be impermissibly vague in *Gonzales* v. *Texas Department of Human Resources*, 581 S.W.2d 522, 530-531 (Tex. App. 1979) (cert. den.; No. 79-913, 2-25-80).

The legislative standard in Delaware for termination of parental rights is that "the parent or parents of any such child . . . are not fitted to continue to exercise parental rights; . . . ", 13 Del. C. § 1103(4), which the Supreme Court

of Delaware considered adequately definite and certain *In Matter of Five Minor Children*, 407 A.2d 199 (Del. 1979) (prob. juris. noted, No. 79-5932; 3-24-80). The Delaware court observed:

> ". . . Indeed, it is difficult to conceive a statute which could particularize a spectrum of optional circumstances that could cover parental unfitness. But we have no doubt that a statutory authorization to terminate parental rights on such ground serves a legitimate social end and should be legislatively permissible." 407 A.2d at 199.

Appellant in the instant case understandably places great reliance upon two lower federal court decisions on the subject of definite and certain child welfare legislation. *Alsager* v. *District Court of Polk County*, 406 F.Supp. 10 (S.D. Ia. 1975); aff'd, 545 F.2d 1137 (8th Cir. 1976) and *Roe* v. *Conn*, 417 F.Supp. 769 (M. D. Ala. 1976). In the former case the following Iowa statute was under consideration:

> ". . . The parents have substantially and continuously, or repeatedly refused to give the child the necessary parental care and protection. . . .
>
> Although financially able, the parents have substantially and continuously neglected to provide the child with necessary subsistance, education or other care necessary for physical or mental care or morals of the child or have neglected to pay for subsistance, education or other care of the child when legal custody is lodged with others. . . .
>
> . . . . The parents are unfit by reason . . . of other conduct found by the court likely to be detrimental to the physical or mental health or morals of the child.

> . . . Following an adjudication of neglect or dependency, reasonable efforts under the direction of the court have failed to correct the conditions leading to the termination." Code of Iowa § 232.41 (1965).

The federal District Court ruled that this statute was vauge on its face, 406 F.Supp. at 21, and the Court of Appeals affirmed on other grounds but recognized the seriousness of the vagueness and overbreadth attacks on the statute, 545 F.2d at 1137. The District Court had apparently found the Iowa law to be overbroad because it inhibited and deterred parents in the full and free exercise of a constitutional right to family integrity. 406 F.Supp. at 19. By extending the doctrine of overbreadth beyond First Amendment freedoms, or placing a constitutional right of family integrity within the First Amendment, this District Court may have plowed new constitutional ground. This idea may also give disproportionate weight to the rights of parents over the welfare of children. The Supreme Judicial Counsel of Massachusetts in *Petition of Department of Public Welfare*, 381 N.E.2d 565 (Mass. 1978) noted:

> "The doctrine of least restrictive alteratives has long served to maximize the expression of protected individual freedoms as against broad governmental encroachment. . . . Our focus of inquiry necessarily changes, however, where, as here, the State acts not simply as an arm of the majority, but on behalf of a helpless individual within its midst. Where the State enters a family situation to protect the interest of the child, the task is not simply to find an accommodation between the rights of the individual parents and the interests of society, . . ." 381 N.E.2d at 573.

And the Supreme Court of Alaska in *D. M.* v. *State*, 515 P.2d 1234 (Alas. 1973) observed:

> ". . . the subjective intent standard often focuses too much attention on the parents wishful thoughts and hopes for the child and too little on the more important element of how well the parents have discharged their parental responsibility. We acknowledge that parental rights are of serious and substantial import. We note, however, that in recent years the courts have become increasingly aware of the rights of children." 515 P.2d at 1237.

This Court in *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158 (1944) remarked:

> ". . . The parent's conflict with the state over control of the child in his training is serious enough when only secular matters are concerned. It becomes even more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. . . ." 321 U.S. at 165.
>
> ". . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; . . . " 321 U.S. at 167.
>
> "The state's authority over children's activities is broader than over like action of adults. . . . A democratic society rests, for its continuance, upon the healthy well-rounded growth of young

people into full maturity as citizens, with all that implies. It may secure this against impending restraints and dangers within a broad range of selection. . . ." 321 U.S. at 168.

More recently, this Court in *Stanley* v. *Illinois*, 405 U.S. 551 (1972) made these comments:

> "The State's right — indeed, duty — to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here. . . ." 405 U.S. at 557.
>
> "For its part the State has made its interest quite plain: Illinois has declared that the aim of the Juvenile Court Act is to protect 'the moral, emotional, mental, and physical welfare of the minor and the best interests of the community' and to 'strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal. . . .' . . . These are legitimate interests, well within the power of the State to implement. We do not question the assertion that neglectful parents may be separated from their children." 405 U.S. at 559.

And, Mr. Justice Douglas stated in dissent in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972):

> ". . . [W]e have in the past analyzed similar conflicts between parent and the State with little regard for the views of the child . . . Recent cases, however, have clearly held that the children themselves have constitutionally protected interests." 406 U.S. at 243.

The three federal judges who decided *Roe* v. *Conn*, 417

F. Supp. 769 (M.D. Ala. 1976) considered the following legislative standard for neglected children:

> "The words 'neglected child' shall mean any child, who, . . . has no proper parental care or guardianship or whose home, by reason of neglect, cruelty, or depravity, on the part of his parent . . . or other person in whose care he may be, is an unfit and improper place for such child . . . or is under such improper or insufficient guardianship or control as to endanger the morals, health or general welfare of such child . . . or who for any other cause is in need of the care and protection of the state." Ala. Code Title 13, § 350(2).

The federal District Court, in determining this Alabama statute unconstitutional, expressed substantial agreement with the federal District Court in the Iowa case and concluded:

> "In the present case, not only is the statutory definition of neglect circular (a neglected child is any child who has no proper parental care by reason of neglect), but it is couched in terms that have no common meaning . . . When is a home 'unfit' or an 'improper' place for a child? Obviously, this is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views. Because these terms are too subjective to denote a sufficient warning to those individuals who might be affected by their proscription, the statute is unconstitutionally vague . . . " 417 F. Supp. at 780.

This federal court in Alabama, and especially that in Iowa, may have imposed the most exacting standard yet for

definity and certainty in parental rights legislation. It is very doubtful that the Missouri child neglect law can meet this standard. However, the decision of the Missouri Supreme Court in this case holding the Missouri law sufficiently definite and certain, 593 S.W.2d at 202-203, appears in conformity with the standard recognized and applied by the state appellate courts of Illinois, Pennsylvania, Texas, Oregon and Delaware (awaiting plenary consideration by this Court) and perhaps the general statements of this Court on the vagueness doctrine:

> " '. . . [B]ut there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest . . . " *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, 578-579 (1973).
>
> "We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principle element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement. . .
>
> * * *
>
> There are areas of human conduct where, by the nature of the problems presented, the legislature simply cannot establish standards with great precision . . . " *Smith* v. *Goguen,* 415 U.S. 566, 574, 616 (1974).

Respondent requests this Court to summarily affirm the judgment of the Supreme Court of Missouri.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
APR 19 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF SHERYL ANN TRAPP, et al.) No. 79-6584

RESPONDENT'S MEMORANDUM PURSUANT TO CLERK'S LETTER OF MARCH 29, 1982

1. Robert Emery Trapp, Jr. was born January 9, 1968 in the General Hospital and Medical Center, Kansas City, Missouri. The Juvenile Court of Jackson County, Missouri, on February 17, 1982, ordered the return of the custody of Robert Emery Trapp, Jr. to his natural parent, Mrs. Linda Mae Brault, and step parent, Mr. Robert Ray Brault. These three persons presently reside at 1013 Fuller, Kansas City, Missouri. The boy remains a ward of the court and the family receives counseling arranged by the Missouri Division of Family Services and monthly visitations by a social worker of the Division (Ms. Susan Williams, 615 East 13th Street, Kansas City, Missouri 64106).

Sheryl Ann Trapp was born April 25, 1969 in the St. Margaret Hospital, Kansas City, Kansas. Sheryl Ann Trapp was placed with foster parents David and Judy Bridgeman on August 5, 1974 and has lived continuously with them since then. The family now resides at P. O. Box 363, Mounds, Oklahoma 74044. The child remains a ward of the Juvenile Court of Henry County, Missouri. (social service workers: Ms. Sheryl Stone, P. O. Box 626, Clinton, Missouri 64735; Mr. Dennis Roan, P. O. Box 1068, Sapulpa, Oklahoma 74066).

DeeAnn Elaine Trapp was born April 17, 1977 in the Bethany Hospital, Kansas City, Kansas. DeeAnn Elaine Trapp was placed July 24, 1981 with foster parents James and Joan Millam, R.R. 1, Clinton, Missouri, 64735, where she now resides. She is also a ward of the Henry County Juvenile Court (Ms. Sheryl Stone). Both Sheryl and DeeAnn have monthly visits with their natural parents Linda Mae Brault in the Division of Family Service offices in Clinton, Missouri. Sheryl has expressed to the social worker a desire that these visits be discontinued. DeeAnn has expressed to the social worker a desire only that she not be required to live with her natural mother.

Duane Edwin Trapp was born September 8, 1972 in the Golden Valley Memorial Hospital, Clinton, Missouri. Duane Edwin Trapp was placed with foster parents Mr. and Mrs. Ronald Johnson on May 24, 1973 and has lived with them since then. They now reside at P. O. Box 1438, Evergreen, Colorado. The boy remains a ward of the Henry County, Missouri, Juvenile Court (social workers Ms. Sheryl Stone; and Ms. Susan Peale, 8550 West 14th Avenue, Lakewood, Colorado, 80215).

A petition for adoption of Sheryl Ann Trapp was filed in behalf of David and Judy Bridgman in the Henry County Circuit Court on October 8, 1974 and was dismissed on April 26, 1976 following the decision of the Missouri Court of Appeals in Kansas City setting aside the prior termination of parental rights order (528 S.W.2d 489). An attempt by Joseph and Lois Petty to adopt DeeAnn Trapp received identical disposition. No other formal attempts to adopt the Trapp children appear to have occurred.

2. Linda Mae (Everhart) Brault was born December 7, 1949 in the State of Kansas (presumably Kansas City). She married Robert Ray Brault in April, 1977. Robert Ray Brault was born November 6, 1955 in Kansas City, Missouri. Robert Emery Trapp was born August 18, 1939 in Kansas City, Missouri. The Missouri Division of Family Services last known address of Robert Emery Trapp is 3500 Palmer, Kansas City, Missouri. The social worker believes that he has little if any interest in the children borne by Linda. The parental rights of Linda Brault or Robert Trapp to their four children have not been terminated, or modified otherwise than already indicated herein. Robert Ray Brault has been convicted of several minor criminal offenses. Linda Mae Brault was convicted of stealing less than $150.00 on August 14, 1980 and sentenced to 30 days in jail (execution suspended) and 2 years probation. (No. CR 80-1190, Jackson Co. Mo. Cir. Ct.).

3. § 211.031, RSMo was last amended in 1980 (S.B. 512, 80th G.A.; Mo. 1980, pp. 331-337; eff. 8-13-80). This amendment added the new language to the statute, to wit:

> 1. . . . [The juvenile court shall have exclusive original jurisdiction in proceedings:]
>
> * * *
>
> [(2) Involving any child who may be a resident of or found within the county and who is alleged to be in need of care and treatment because:]
>
> (a) The child while subject to compulsory school attendance is repeatedly and without justification absent from school; or

(b) The child disobeys the reasonable and lawful directions of his parents or other custodian and is beyond their control; or

(c) The child is habitually absent from his home without sufficient cause, permission, or justification; or

* * *

(3) The child is charged with an offense not classified as criminal, or with an offense applicable only to children, except that, the juvenile court shall not have jurisdiction over any child sixteen years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony;

* * *

3. In any proceeding involving any child taken into custody in a county other than the county of the child's residence, the juvenile court of the county of the child's residence shall be notified of such taking into custody within seventy-two hours.

§ 211.031 RSMo 1981 Cum. Supp. (existing language retained by S.B. 512 bracketed)

§ 211.181, RSMo was also last amended by S.B. 512 (1980). The language thereby added to this statute was as follows:

[When a child is found by the court to come within . . . (§ 211.031-1(1)) . . . the court . . . finding

. . . its jurisdiction over the child . . . may . . .:

(1) Place the child under supervision in his own home or in the custody of a relative or other suitable person] after the court or a public agency or institution designated by the court conducts an investigation of the home, relative or person and finds such home, relative or person to be suitable. . . .

[(2) A public agency or institution authorized by law to care for children or to place them in family homes;] except that, such child may not be committed to the department of social services, division of youth services;

* * *

2. When a child is found by the court to come within . . . (§ 211.031-1(2)) . . . the court . . . finding . . . its jurisdiction over the child may . . .

* * *

(2) Commit the child to the custody of:

(a) A public agency or institution . . .; except that a child may be committed to the department of social services, division of youth services, only if he is presently under the court's supervision after an adjudication under . . . (§ 211.031-1(2) or (3)) . . .

* * *

3. When a child is found by the court to come within . . . (§ 211.031-1(3)) . . . the court . . . finding . . . its jurisdiction over the child . . . may . . .

* * *

(6) Order the child to make restitution or reparation for the damage or loss caused by his offense. In determining the amount or extent of the damage, the court may order the juvenile officer to prepare a report and may receive other evidence necessary for such determination. The child and his attorney shall have access to any reports which may be prepared, and shall have the right to present evidence at any hearing held to ascertain the amount of damages. Any restitution or reparation ordered shall be reasonable in view of the child's ability to make payment or to perform the reparation. The court may require the clerk of the circuit court to act as receiving and disbursing agent for any payment ordered;

(7) Order the child to a term of community service under the supervision of the court or an organization selected by the court.

* * *

§ 211.181 RSMo 1981, Cum. Supp. (Existing language retained by S.B. 512 in brackets).

The other changes to Chapter 211, RSMo in the 1980 legislative session related to he commitment or reference of mentally disordered children to the Department of Mental Health and would seem to have little relevance to the present case. §§ 211.201 et seq., RSMo 1980 Cum. Supp. (H.B. 1724, 80th G.A.; L.Mo. 1980, pp. 511-514).

The 1981 legislative session did not amend Chapter 211, RSMo.

The 1982 legislative session, which must adjourn on or before May 15, 1982, may very well enact H.B. 1171, etc. ". . . for the purpose of providing a more uniform system for the protection, reformation, and placement of certain children . . ." (bill title) which would amend Chapter 210, RSMo relating to child protection and reformation; §§ 211.041, 211.442, and 211.447 of Chapter 211, juvenile courts; and Chapter 453, the adoption code. However, it is not apparent that any of the amendments would particularly affect the issues in this appeal.

4. The docket sheet for In the Matter of Trapp Children, No. J887, Circuit Court of Henry County, Missouri (appealed thrice; 528 S.W.2d 489; 562 S.W.2d 172; 593 S.W.2d 193) reflects no pending attempts to terminate the natural parental rights in these children. A change of judge occurred after the Missouri Supreme Court decision and Circuit Judge Charles V. Barker of Bolivar, Missouri is now overseeing the various social worker supervision of Linda Mae Trapp's parenting of the oldest boy and the foster parenting of the three other children.

5. Except for the reunion the oldest child and the natural parent, respondent does not know of reasons why this appeal, wholly or partially, is now moot.

6. Santosky v. Kramer, No. 80-5889, March 24, 1982, appears to have rule that in termination of parental rights proceeding the standard of proof to support termination is one of clear and convincing evidence rather than a fair preponderance of the evidence. That has been the statutory law of Missouri since

at least 1957. § 211.447, RSMo (from S.B. 15, 69th G.A.; L.Mo. 1957, pp. 642-659). The standard of proof necessary to support a judicial deprivation of a natural parent's physical custody of a child due to abuse or neglect is not expressly stated in the statutes, particularly, §§ 211.031, 211.171, 211.181, although this direction is given:

> The practice and procedure common in equity shall govern all proceedings in the juvenile court. § 211.171-6.

This direction may invoke the following statute:

> In cases tried upon the facts without a jury, . . . the court shall render such judgment as it thinks right upon the law and the evidence. . . . § 510.310, RSMo.

It does not appear that Santosky has decided that state laws authorizing courts to temporarily separate natural parent and child due to suspected or confirmed abuse or neglect are also subject to the clear and convincing evidence standard of proof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 16th day of April, 1982, to:

James L. Muller
Legal Aid of Western Mo.
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Kansas City, MO 64106

Louren R. Wood

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No. 79-6584

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

In the Matter of

SHERYL ANN TRAPP, DEE ANN TRAPP,
and DUANE EDWIN TRAPP, Minors,

ROBERT EMERY TRAPP, Father,
LINDA MAE TRAPP, Mother and
Appellant.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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TABLE OF CONTENTS

ARGUMENT 1

I. CONTRARY TO THE VIEW OF THE MISSOURI SUPREME COURT AND THAT OF THE CASES RELIED ON BY APPELLEE, THE NEGLECT STANDARDS OF §211.031 RSMo CAN BE DEFINED IN SPECIFIC TERMS WHICH CURE THE VAGUENESS AND OVERBREADTH OF THE MISSOURI STATUTE AND ACCOMMODATE THE CONSTITUTIONAL RIGHTS AND INTERESTS OF THE PARENTS, THE CHILD, AND THE STATE 1

II. THE MISSOURI SUPREME COURT IS ALSO IN ERROR IN FAILING TO RECOGNIZE THAT THE NEGLECT STATUTES (§§211.031 AND 211.181 RSMo) ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED BECAUSE THEY DENY SUBSTANTIVE DUE PROCESS IN THAT THEY DO NOT REQUIRE THE STATE TO SHOW THAT THE CHILD IS IMMINENTLY SUBJECT TO A SUBSTANTIAL RISK OF SUFFERING SERIOUS HARM DUE TO THE CULPABLE CONDUCT OF HIS PARENTS AND THAT MORE HARM IS LIKELY TO BEFALL THE CHILD BY BEING PERMITTED TO REMAIN WITH HIS PARENTS THAN BY BEING SEPARATED FROM THEM, SO AS TO GIVE THE STATE THE COMPELLING STATE INTEREST NECESSARY TO JUSTIFY DEPRIVING THE PARENTS OF THE FUNDAMENTAL RIGHT TO THE CUSTODY OF THEIR CHILDREN 4

CONCLUSION 7

TABLE OF AUTHORITIES

Alsager v. District Court of Polk County, 406 F.Supp. 10 (S.D.Ia.), aff'd, 545 F.2d 1137 (8th Cir.) 4,5,6

Ex parte Crouse, 4 Whart 9 (Pa. 1839) 2

In re Gault, 387 U.S. 1 2

Minor Children of F.B. v. Caruthers, 323 S.W.2d 397 (Mo.App.) 1,2

Prince v. Massachusetts, 321 U.S 158 5

Quilloin v. Walcott, 434 U.S. 246 7

Roe v. Conn, 417 F.Supp. 769 (M.D.Ala.) 5,6

In re Sherol A.S., 581 P.2d 884 (Okl.) 5

Simmons v. Smith, 366 P.2d 875 (Ore.) 6

Sims v. State Dept. of Public Welfare, 438 F.Supp. 1179 (S.D.Tex.), rev'd on procedural grounds, 442 U.S. 415 5

Smith v. Organization of Foster Families, 431 U.S. 816 7

State v. Robert H., 393 A.2d 1387 (N.H.) 7

In re T.M.M., 267 N.W.2d 807 (N.D.) 6

Wellesley v. Wellesley, 2 Bligh N.S. 124, 4 English Reports (Reprint) 1078 (1828) 2

Wisconsin v. Yoder, 406 U.S. 205 2,5

STATUTES AND OTHER AUTHORITIES:

Revised Statutes of Missouri (RSMo) 1969 and 1978, §§211.011, 211.031, 211.171, and 211.181 1,4,6

ABA Juvenile Justice Standards Project, Standards Relating to Abuse and Neglect (1977) 2,3,4,5,6

Cogan, Juvenile Law, Before and After the Entrance of "Parens Patriae", 22 S.Car.L.Rev. 147 (1970) 2

Rendleman, Parens Patriae: From Chancery to the Juvenile Court, 23 S.Car.L.Rev. 205 (1971) 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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ON APPEAL FROM THE SUPREME COURT OF MISSOURI

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

ARGUMENT

I.

CONTRARY TO THE VIEW OF THE MISSOURI SUPREME COURT AND THAT OF THE CASES RELIED ON BY APPELLEE, THE NEGLECT STANDARDS OF §211.-031 RSMo CAN BE DEFINED IN SPECIFIC TERMS WHICH CURE THE VAGUENESS AND OVERBREADTH OF THE MISSOURI STATUTE AND ACCOMMODATE THE CONSTITUTIONAL RIGHTS AND INTERESTS OF THE PARENTS, THE CHILD, AND THE STATE.

As heretofore shown in appellant's Jurisdictional Statement (pp. 27-30), the neglect standards embodied in §211.031 RSMo 1969 are susceptible to such multifareous interpretations that they do not, and did not here, give fair warning of what parental conduct is proscribed, and they afford so much discretion in their application that they permit, and permitted here, the arbitrary and discriminatory separation of the child from the parents. As acknowledged in Minor Children of F.B. v. Caruthers, 323 S.W.2d 397 (Mo. App. 1959), which the Missouri Supreme Court approved and followed in this case (App. A, pp. 10-11), §211.031 RSMo "is indeed broad," and it grants the juvenile court "wide judicial discretion." Id. at 400, 401.

The Missouri Supreme Court nevertheless held that the statute is not unconstitutionally vague and overbroad, and it did so primarily on the ground that child neglect is incapable of being de-

fined in more definite and certain terms.[1] But the contention that such broad and vague neglect standards are a necessity, and even a virtue, is not well founded. Demonstrably, such broadness and vagueness not only should but can be cured by defining the grounds for state intervention in terms of specific harms to the child so as to permit the State to intervene only when the child is and will continue to be imminently subject to a substantial risk of serious harm as a result of the culpable conduct of his parents, and more harm is likely to befall the child by remaining with his parents than by being separated from them—as has been done in the American Bar Association Juvenile Justice Standards Project's Standards Relating to Abuse and Neglect (1977), pp. 1-7, 9-29, 37-44, 48-64, 119-129.

Standards 1.1, 1.2, 1.3, 2.1, and 2.2 of the ABA Standards (Id. at 9-11) provide as follows:

> "1.1 Family Automony. Laws structuring a system of coercive intervention on behalf of endangered children should be based on a strong presumption for parental autonomy in child rearing. Coercive state intervention should occur only when a

---

[1] The Missouri Supreme Court also indicates approval of the conclusion of the Caruthers Court that §211.031 RSMo is not unconstitutional because it is in effect but a restatement of the broad discretionary jurisdiction long exercised by courts in equity to enforce the State's "paramount" power to protect and promote the well-being of children under the early concept of parens patriae. 323 S.W.2d at 400-401. However, as this Court observed in In re Gault, 387 U.S. 1, 16 (1967), this Latin phrase "proved to be a great help to those who sought to rationalize the exclusion of juveniles [and their parents] from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance." The phrase was taken from chancery practice where, however, it was used to describe the power of the Crown which the chancery court exercised in actions between private parties, not for the purpose of protecting children from neglect, but to secure and preserve their estates and to protect their person only in so far as their education and marriage were concerned. See Cogan, Juvenile Law, Before and After the Entrance of "Parens Patriae", 22 S.Car.L.Rev. 147 (1970); Rendleman, Parens Patriae: From Chancery to the Juvenile Court, 23 S.Car.L.Rev. 205, 207-210, 219 n. 76, 255-259 (1971). In fact, as recognized in Wellesley v. Wellesley, 2 Bligh N.S. 124, 4 English Reports (Reprint) 1078, 1083 (1828), on which the Caruthers Court purports to rely, the chancery court had no jurisdiction to protect the person of the child from mistreatment or abuse.

Thus the concept of parens patriae was misinterpreted and misapplied when used in cases such as Ex parte Crouse, 4 Whart 9, 11 (Pa. 1839), on which Caruthers relies, to support the proposition that the State has almost plenary power to intervene in parent-child relations. See Rendleman, supra, 23 S.Car.L.Rev. at 218-219. Indeed, as held in Gault, supra, 387 U.S. at 30, "the Juvenile Court Judge's exercise of the power of the state as parens patriae [is] not unlimited." Cf. Wisconsin v. Yoder, 406 U.S. 205, 229-230, 232-234 (1972).

child is suffering specific harms as defined in Standard 2.1.

* * *

"1.2 Purpose of Intervention. Coercive state intervention should be premised upon specific harms that a child has suffered or is likely to suffer.

"1.3 Statutory Guidelines. The statutory grounds for coercive intervention on behalf of endangered children:

A. Should be defined as specifically as possible;

B. Should authorize intervention only when the child is suffering, or there is a substantial likelihood that the child will imminently suffer, serious harm;

C. Should permit coercive intervention only for categories of harm where intervention will, in most cases, do more good than harm.

"2.1 Statutory Grounds for Intervention. Courts should be authorized to assume jurisdiction in order to condition continued parental custody upon the parents' accepting supervision or to remove a child from his/her home only when a child is endangered in a manner specified in subsections A.-F.:

A. A child has suffered, or there is a substantial risk that a child will imminently suffer, a physical harm, inflicted nonaccidentally upon him/her by his/her parents, which causes, or creates a substantial risk of causing disfigurement, impairment of bodily functioning, or other serious physical injury;

B. A child has suffered, or there is a substantial risk that the child will imminently suffer, physical harm causing disfigurement, impairment of bodily functioning, or other seriour physical injury as a result of conditions created by his/her parents or by the failure of the parents to adequately supervise or protect him/her;

C. A child is suffering serious emotional damage, evidenced by severe anxiety, depression, or withdrawal, or untoward aggressive behavior toward self or others, and the child's parents are not willing to provide treatment for him/her;

D. A child has been sexually abused by his/her parent or a member of his/her household (alternative: a child has been sexually abused by his/her parent or a member of his/her house-

hold and is seriously harmed physically or emotionally thereby);

E. A child is in need of medical treatment to cure, alleviate, or prevent him/her from suffering serious physical harm which may result in death, disfigurement, or substantial impairment of bodily functions, and his/her parents are unwilling to provide or consent to the medical treatment;

F. A child is committing delinquent acts as a result of parental encouragement, guidance, or approval.

"2.2 Need for Intervention in Specific Case. The fact that a child is endangered in a manner specified in Standard 2.1 A.-F. should be a necessary but not sufficient condition for a court to intervene. In order to assume jurisdiction, a court should also have to find that intervention is necessary to protect the child from being endangered in the future. This decision should be made in accordance with the standards proposed in Part VI."

Thus it appears that neglect standards can be devised which comport with the holding in Alsager v. District Court of Polk County, 406 F.Supp. 10, 21 (S.D.Ia. 1975), that "Due process requires the state to clearly identify and define the evil from which the child needs protection and to specify what parental conduct so contributes to that evil that the state is justified in [intervening in] the parent-child relationship," and which, at the same time, do not diminish the rights of children, nor prevent the State from exercising its right and duty to protect children from harm. In other words, as the ABA Standards demonstrate, standards of neglect can be defined in specific terms which would cure the vagueness and overbreadth of the Missouri statute (§211.031 RSMo) and accommodate the constitutional rights and interests of the parents, the child and the State.

II.

THE MISSOURI SUPREME COURT IS ALSO IN ERROR IN FAILING TO RECOGNIZE THAT THE MISSOURI NEGLECT STATUTES (§§211.031 AND 211.181 RSMo) ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED BECAUSE THEY DENY SUBSTANTIVE DUE PROCESS IN THAT THEY DO NOT REQUIRE THE STATE TO SHOW THAT THE CHILD IN IMMINENTLY SUBJECT TO A SUBSTANTIAL RISK OF SUFFERING SERIOUS HARM DUE TO THE CULPABLE CONDUCT OF HIS PARENTS AND

THAT MORE HARM IS LIKELY TO BEFALL THE CHILD BY BEING PERMITTED TO REMAIN WITH HIS PARENTS THAN BE BEING SEPARATED FROM THEM, SO AS TO GIVE THE STATE THE COMPELLING STATE INTEREST NECESSARY TO JUSTIFY DEPRIVING THE PARENTS OF THE FUNDAMENTAL RIGHT TO THE CUSTODY OF THEIR CHILDREN.

Appellee does not specifically[2] address this point which, as shown in appellant's Jurisdictional Statement (pp. 30-34), is supported by the holding of the federal district court in Alsager, supra, 406 F.Supp. at 22-24 (S.D.Ia. 1975); the Eighth Circuit on appeal in Alsager, supra, 545 F.2d 1137 (8th Cir. 1976); the three-judge district court in Roe v. Conn, 417 F.Supp. 769, 777-779 (M.D.Ala. 1976); the three-judge district court in Sims v. State Dept. of Public Welfare, 438 F.Supp. 1179, 1192 n. 14, 1193-1194 (S.D.Tex. 1977), rev'd on procedural grounds, 442 U.S. 415 (1979); and the ABA Standards Relating to Abuse and Neglect, ante at 2-4.

As recognized by the Supreme Court of Oklahoma in applying the holding of Alsager, Roe v. Conn, and Sims, in In re Sherol A.S., 581 P.2d 884, 888 (Okl. 1978):

> "* * * The purpose of termination is to protect children from HARM suffered by reason of either neglect or the intentional actions of their parents. Termination is not a means by which the State . . ., through its juvenile courts . . ., can exact conformity from its citizen-parents through the imposition of an 'acceptable' common value system and 'lifestyle'. There is no authority in [the Oklahoma] Juvenile Code which allows the State to interfere with family relationships where harm to children is not involved. This is, of course, a notion of constitutional dimension. The fundamental integrity

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[2] In his Motion to Affirm (at 18-19), appellee quotes sweeping language from Prince v. Massachusetts, 321 U.S. 158, 165, 167, 168 (1944), to the effect that the State as parens patriae has a wide range of power for limiting parental freedom and authority in things effecting the child's welfare. But as pointed out in Wisconsin v. Yoder, 406 U.S. 205, 229-230 (1972), the Court has since taken great care to confine Prince to a narrow scope, i.e., to conduct or actions which pose a "substantial threat" of "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare . . .." In other words, "the power of the parent [to direct the upbringing of his children] may be subject to limitation under Prince [only] if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burden." (Emphasis added.) 406 U.S. at 233-234.

of the family unit, which has found protection in the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Ninth Amendment, is subject to intrusion and dismemberment by the State only where a 'compelling' State interest arises and protecting the child from harm is the requisite State interest." (Emphasis by the Court.) (Citations omitted.)

The Oklahoma Court then stated that the evidence showed no "actual or imminent harm" to the children, and concluded (Id. at 890) that "these children will enjoy fewer material, educational and cultural advantages than many of their peers—but these facts do not rise to the threshold of harm prerequisite to severing the natural and legal bonds of parent and child."

The Missouri neglect statutes provide no such restrictive standard, and by the same token, require no threshold of harm. On the contrary, §211.011 RSMo (App. E, p. 1) declares that the purpose of the Juvenile Courts Chapter "is to facilitate the care, protection and discipline of children," and proceeds to speak in expansive terms of removal "to the end that each child coming within the jurisdiction of the juvenile court shall receive such care . . . as will conduce to the child's welfare and the best interest of the state." Indeed, §211.171 RSMo (App. E, p. 2) provides that the juvenile court judge shall determine the procedure to be followed at the hearing, and he "may inquire into the habits, surroundings, conditions and tendencies of the child to enable the court to render such order or judgment as will best promote the welfare of the child and carry out the objectives of §§211.011 to 211.431."[3]

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[3] The "best interest of the child" is a phrase which has been borrowed from divorce law where it is entirely appropriate in determining with which of the parents, who have an equal but unshareable right to custody, the child will be better off; but the phrase has no valid application in custody litigation between a parent and the State. Simmons v. Smith, 366 P.2d 875, 876 (Ore. 1961); Roe v. Conn, supra, 417 F.Supp. at 779 n. 12; In re T.M.M., 267 N.W.2d 807, 812 (N.D. 1978). Indeed, if the test for removal of a child from his parents was whether he would be "better off" with someone else, then there could be a massive reallocation of children to new parents.

As pointed out in the Commentary, the ABA Standards Relating to Abuse and Neglect, supra, at 120-121, reject the "best interest" test in neglect proceedings for a number of reasons: "First, no legislature has provided statutory guidelines that spell out the factors a court should consider in determining the child's best interest. Obviously, this term may mean different things. * * * In the absense of legislative definition, there is considerable variation among judges in applying the test. Decisions may reflect indi-

Thus it appears that the Missouri neglect statutes on their face permit, and permitted here, the removal of children from their parents without any showing that the children are suffering or will be imminently subject to a substantial risk of suffering serious harm due to the culpable conduct of their parents, if left with them. By the same token, the Missouri statutes are unconstitutional on their face and as applied here because they deny substantive due process in that they permit, and here permitted, parents to be deprived of their fundamental right to the custody of their children without the showing of a level of harm sufficient to give the State a "child-protection interest" compelling enough to justify such deprivation of constitutional rights.

CONCLUSION

For these reasons together with those heretofore presented, this Court should note probable jurisdiction and set this case for plenary briefing and argument.

Respectfully submitted,

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3/ (cont'd)

vidual judges' views of a proper upbringing. As a result, there has been unequal treatment of parents and children, discrimination on the basis of race and social class, and judicial decisions based on value judgments not commonly held by society or approved by the legislature."

Indeed, in Smith v. Organization of Foster Families, 431 U.S. 816, 834 n. 35 (1977), this Court observed that judges "may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." And in Quilloin v. Walcott, 434 U.S. 246, 255 (1978), this Court stated: "We have little doubt that the Due Process Clause would be offended '[i]f a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'"

Compare State v. Robert H., 393 A.2d 1387, 1390, 1391 (N.H. 1978), where the Supreme Court of New Hampshire stated that ". . . to hold merely that inadequate parenting, absent specific harm to the children, is sufficient to terminate parental rights in the 'best interest of the child' is too vague a concept and places undue emphasis on the parental conduct rather than any harm to the child," and held that, "absent a showing of specific harm to the children, 'growing up in a so-called disadvantaged home is not a sufficient basis for coercive intervention [by the State].'"

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